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No. 2410

United States
Circuit Court of Appeals
For the Ninth Circuit.

BENSON LUMBER COMPANY, a Corporation,
Plaintiff in Error,

vs.

H. C. McCANN, by JESSE F. McCANN, His Guardian ad Litem,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the Southern District of California,
Southern Division.

Filed

JUL - 1 1914

F. D. Monckton,
Clerk.

No. 2410

United States
Circuit Court of Appeals
For the Ninth Circuit.

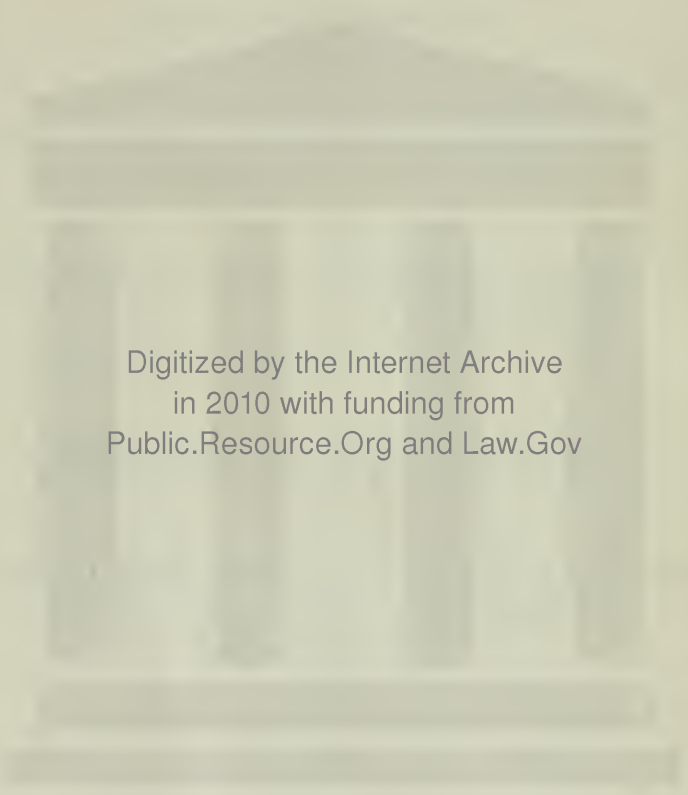
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys.

For Plaintiff in Error:

Messrs. GIBSON, DUNN & CRUTCHER, 718
Pacific Electric Building, Los Angeles, California;

Messrs. WRIGHT & WINNEK, 817-820 Timken Building, San Diego, California.

For Defendant in Error:

Messrs. HUNSAKER & BRITT, 1132 Title Insurance Building, Los Angeles, California;

Messrs. HAINES & HAINES, Timken Building, San Diego, California. [4*]

[Writ of Error (Original).]

UNITED STATES OF AMERICA,—ss.

The President of the United States, to the Honorable the Judge of the District Court of the United States for the Southern District of California, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a cause which is in the said District Court before you wherein the Benson Lumber Company, a corporation, is plaintiff in error, and H. C. McCann, defendant in error, a manifest error hath happened to the great damage of the said plaintiff in error, as by its complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do com-

*Page-number appearing at foot of page of original certified Record.

mand you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 25th day of March, next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States, the 24th day of February, in the year of our Lord, One Thousand Nine Hundred and Fourteen.

[Seal]

WM. M. VAN DYKE,

Clerk of the District Court of the United States, for the Southern District of California, Southern Division.

By R. S. Zimmerman,
Deputy. [5]

The above writ of error is hereby allowed.

OLIN WELLBORN,
Judge.

I hereby certify that a copy of the within writ of error was on the 24th day of February, 1914, lodged in the clerk's office for the Southern Division, of the

Southern District of California, for the said defendant in error.

WM. M. VAN DYKE,
Clerk U. S. District Court, Southern District of
California.

By Chas. N. Williams,
Deputy Clerk. [6]

[Endorsed]: C. C. No. 1478. Dept. No. In the U. S. District Court, Southern District of California, Southern Division. H. C. McCann, by Jesse F. McCann, his Guardian *ad Litem*, Plaintiff, vs. Benson Lumber Company, Defendant. Writ of Error. Filed Feb. 24, 1914. Wm. M. Van Dyke, Clerk. By Chas N. Williams, Deputy Clerk. [7]

[Citation on Writ of Error (Original).]

UNITED STATES OF AMERICA,—ss.

To H. C. McCann, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, on the 25th day of March, 1914, pursuant to a writ of error on file in the clerk's office of the District Court of the United States, for the Southern District of California, Southern Division, in that certain action No. C. C. 1478, wherein the Benson Lumber Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment given, made and rendered against the said Benson Lumber Company, in the said writ of error mentioned, should not be cor-

rected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable OLIN WELLBORN, United States District Judge, for the Southern District of California, this 24th day of February, 1914, and of the Independence of the United States the one hundred and thirty-eighth.

OLIN WELLBORN,
United States District Judge, for the Southern District of California. [8]

Due service of the foregoing citation in the cause therein mentioned, upon the defendant in error therein, is hereby admitted this 26 day of February, 1914.

HUNSAKER & BRITT and
HAINES & HAINES,

Attorneys for Defendant in Error. [9]

[Endorsed]: C. C. No. 1478. Dept. No. In the District Court of the United States, Southern District of Cal., State of California. H. C. McCann, by Jesse F. McCann, His Guardian *ad Litem*, Plaintiff, vs. Benson Lumber Company, Defendant. Citation. Filed Mar. 5, 1914. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. [10]

[Certificate of Clerk to Transcript of Record on
Removal.]

*In the District Court of the United States of
America, in and for the Southern District of
California, Southern Division.*

C. C. 1478.

H. C. McCANN, by JESSE F. McCANN, His Guard-
ian *ad Litem*,

Plaintiff,

vs.

BENSON LUMBER COMPANY, a Corporation,
Defendant. [11]

I, William H. Francis, County Clerk and ex-officio Clerk of the Superior Court in and for the County of San Diego, State of California, hereby certify that the within papers are a true and correct copy of the records in the said Superior Court in the case of H. C. McCann, by Jesse F. McCann, His Guardian *ad Litem*, Plaintiff, vs. The Benson Lumber Company, a Corporation, Defendant, and that the within papers are a true and correct copy of the complaint, demurrer, petition for removing the said cause from the said Superior Court of the County of San Diego, State of California, to the Circuit Court of the United States, for the Southern District of California, in the 9th Circuit, of the bond filed with said petition and of the order for said removal.

IN WITNESS WHEREOF, I have hereunto set

my hand and affixed the seal of said Court this 6th day of January, 1909.

[Seal]

WM. H. FRANCIS,
County Clerk, and ex-officio Clerk of the Superior
Court, San Diego, Calif.

By W. Wirt Francis,
Deputy. [12]

*In the Superior Court of the County of San Diego,
State of California.*

H. C. McCANN, by JESSE F. McCANN, His Guardian
ad Litem,

Plaintiff,

vs.

BENSON LUMBER COMPANY (a Corporation),
Defendant.

Complaint.

H. C. McCann, the plaintiff above named, appearing by Jesse F. McCann, his guardian *ad litem*, for cause of action against the Benson Lumber Company, the defendant above named, states:

I.

That on the 29 day of July, 1908, the said Court duly made and gave its order, by which it appointed Jesse F. McCann as guardian *ad litem* for plaintiff to represent him in said action.

II.

That the defendant Benson Lumber Company is a corporation duly organized under the laws of the State of Oregon and having its principal place of business in the city of Portland, Oregon. That de-

fendant has at all times herein mentioned maintained and owned, and still maintains and owns, a mill for the sawing and working up of logs into lumber; that said mill is situated upon the Bay of San Diego, California, but within the corporate limits of the city of San Diego, California, and near the southwesterly end of Beardsley Street of said city, otherwise known as South Twenty-second street, in said city.

III.

That during all the time herein mentioned in carrying out [13] the process of sawing logs and converting the same into lumber by defendant in its said mill, the logs were first sawed lengthwise into various dimensions.

Next the lengths of lumber so cut were delivered from the log carriage sidewise and easterly, in constant succession, to and upon a platform, or table about twenty-two feet long by ten wide, extending lengthwise along the easterly side of said mill and along an opening in such side for the full length of said platform. Said platform is hereinafter referred to as table "A."

That below said table "A" and crosswise of it at intervals of two feet along its entire length were circular revolving saws so constructed that one or more of the same at a time could by the person in charge of them, hereinafter designated as the "trimmer," at his discretion be caused to project up through the top of said table and to saw crosswise all boards and lumber forced against such saws; and that for the purpose of cutting such boards

and lumber as delivered from the log carriage into proper lengths for use, such boards and lumber were carried by machinery as fast as they came from the log carriage sidewise across said table from west to east and against said saws, and that after being thereby sawed into the lengths required, such boards and lumber were dropped from the easterly side of said table "A" through said opening in the easterly wall of said mill. That east of the easterly wall of said mill, and along the same and about four feet distant therefrom and directly opposite said opening therein through which said boards and lumber were so dropped, and directly opposite said table "A" were constructed and placed two other platforms or tables, to receive said lumber as so continuously delivered from said table "A." [14]

The one such platform or table hereinafter designated as table "B" was about four feet wide and ten and a half feet long; and that it was set so that its northerly end was on a line with the northerly end of said table "A" and extended southward parallel to and four feet eastward from said table "A."

The other such platform or table hereinafter designated as table "C" was about eight feet wide and fifteen feet long; and that it was set so that its north end was about one and one-half feet south of said table "B," and extended its length southward, likewise parallel to said table "A" and four feet eastward from it. That while the westerly sides of the said tables "B" and "C" were on the same line, and said uniform distance of four feet from the eastern edge of said table "A," the said table

"C" projected easterly about eight feet further than said table "B." That said table "B" was constructed so as *to about* two feet higher than said table "C." That between the easterly edge of said table "A" on the one side and said tables "B" and "C" on the other, for a width from west to east of about said four feet and for a distance from north to south equal to the combined length of said tables "B" and "C" was a chute or slide inclined downward toward said tables "B" and "C," and also sloping from south to north; but that at all points opposite said tables "B" said chute was lower than the surface of either of said tables. That the surface of said table "A" at its easterly side is three feet, more or less, higher than the surface of said table "B" and five feet more or less higher than the surface of said table "C," and that from west to east over the surface of said table "A" at its easterly edge and the surface of said tables "B" and "C" at their respective westerly edges and across said open space or chute at intervals from north to south of about three feet were placed pairs of cross-timbers hereinafter described as "skids"; the two members of each pair of such skids being about one foot apart. [15]

That after being sawed upon said table "A" into the lengths required and dropped therefrom through the said opening in the easterly wall of said mill such lumber so sawed is and was at times herein mentioned and according to the common practice at said mill allowed to slide sidewise across and down said skids and to and upon said tables "B"

and "C"; and that in so sliding down and across said "skids" to and upon said tables, the pieces of lumber sawed upon said table "A" to a greater length than from twelve to fourteen feet so fell upon said tables "B" and "C" as to lie partly on the one and partly on the other; and pieces of lumber sawed to a shorter length fell indifferently upon said table "B" *on* said table "C."

That under said table "B" and extending cross-wise on it up through openings in its surface to a height of about one inch above its surface were constructed four revolving rollers, to wit, one extending across said table "B" near its northerly edge, one extending across said table "B" near its southerly edge, and two extending across said table "B" between said northerly and southerly rollers. That according to the custom and practice at said mill said rollers were caused constantly so to revolve as to carry in constant succession the boards and lumber so falling on said table "B" from north to south along and off said table "B" and to and upon said table "C," and by means of endless chains upon said table "C" lumber falling directly upon said table "C" was caused to move easterly on said table "C" and upon reaching the easterly edge of said table "C" such boards and lumber were seized, removed and piled upon trucks by workmen in charge of said tables "B" and "C."

That the southmost roller on said table "B" herein after referred to as the "dog-roller" is thickly studded with rounded projections of steel known and described as "dogs" one and one-half [16]

inches or thereabouts high and about three-eighths of an inch each in diameter. That said dog-roller at all times herein mentioned occupied the south end of said table "B" and that the extreme southerly edge of said table was at all times herein mentioned formed by a heavy plank, set edgewise, hereinafter described as plank "X," extending from below upward to a height slightly lower than that of the general surface of the said table "B." That said plank "X" was at all times herein mentioned fastened immediately south of said dog-roller and so near thereto that when said dog-roller revolved, the dogs or projections thereon cleared said plank by only half an inch or thereabouts.

That at all times herein mentioned said arrangements for distributing the boards and lumber dropped from said table "A" through the said opening in the easterly wall of said mill were subject to complication and disorder as follows: That boards and lumber cut to shorter lengths, in sliding down said "skids" from said table "A" toward said table "B" or said table "C," at times fell between said "skids" and stood on end in a perpendicular or partially perpendicular position with one end projecting into such open chute and between two pairs of said "skids"; and that such boards and lumber at times so fell in a nearly horizontal position between pairs of said skids that one end fell upon said table "B" or said table "C" as the case might be, thereby causing boards and lumber to be accumulated and piled up upon said table "B" or on said

table "C" and obstructing the process of removing the same therefrom.

3.

That at all times herein mentioned all of the operations of said mill outside of the said mill building were entrusted by the defendant corporation to the immediate charge of a yard foreman. That said foreman had charge among other things of [17] said tables "B" and "C" and the attendants thereon. That it was the practice of said yard foreman when obstructions occurred in any of the ways hereinbefore mentioned upon said table "B" either himself to climb up upon said table to remove the same, or to direct or allow some one of said attendants so to do, of all which defendant was fully informed. That said yard foreman and said defendant were familiar with the practice of so doing and never protested against the same but had prior to the 30 day of July, 1907, often observed said practice and been thoroughly familiar therewith and approved thereof; and that the defendant corporation had theretofore provided the attendants about said table "C" with hooks attached to short handles for the express purpose of being used in so handling the lumber upon said table "B" and "C."

That at all times herein mentioned under the supervision and instructions of said yard foreman and with the knowledge and approval of defendant it had been the practice of the attendants in charge of said tables "B" and "C," whenever lumber became so clogged and piled up upon said table "B," under the orders of said yard foreman, to climb upon said

table "B" and by hand to remove the obstructions thereon and particularly to remove any boards or lumber that might have become caught or wedged between or under said "skids," and that the only practicable means for cleaning away such clogging was so to do. That by reason of the number of rollers on said table "B," and of the mechanism therewith connected, as well as by reason of the height of said table, it was commonly impracticable, and was on said 30 day of July, and at the time plaintiff suffered the hereinafter mentioned injuries, impracticable, for the attendants in charge of said table to climb directly from the ground upon said table "B."

That consequently it was at all times herein mentioned the [18] only feasible way, and the common practice, at said mill when such clogging occurred, in order to clear the same, to mount upon said table "B" from said table "C" by stepping from said table "C" over and across said dog-roller, all of which was at all times well known to defendant's agents, foreman, said yard foreman, and to the superintendent placed by the defendant in charge of said mill, and to the defendant.

But that it was never the practice of defendant at said mill to stop the sawing and the stream of lumber from said table "A," or to stop the rollers upon said table "B," to give opportunity to safely remove the obstructions constantly arising through the unavoidable occurrence of jams and accumulations of lumber thereon; and that defendant at all times herein mentioned negligently failed to provide

suitable apparatus for stopping said rollers; but that the same could only be stopped by communicating with the engine-room of said mill and causing the same to be stopped from there. That at no time herein mentioned could said tables "B" and "C," or either of them, or any of the attendants in charge thereof, be seen from said engine-room; nor did defendant at any time provide the said attendants about said table "B" and "C" or any of said attendants with any means of having said rollers or machinery stopped, except by such communication with said engine-room, and to cause said machinery to be stopped required five minutes or thereabouts. That at all times herein mentioned it was the ordinary practice at said mill to allow lumber to drop from said table "A" and to continue to slide down said "skids" to and upon said tables "B" and "C" and to allow said rollers on said table "B" including the said "dog-roller" to continue to revolve, notwithstanding such jams, obstructions and accumulations of lumber on, under or between said "skids" and on said tables, and notwithstanding that at the same time [19] attendants were or might be upon said table "B," endeavoring to remove such obstructions and accumulations of lumber; all of which was at all times exceedingly dangerous and perilous, and to defendant, its agents, foreman, yard foreman, and superintendent well known to be thus dangerous and perilous.

That on the said 30 day of July, 1907, plaintiff was of the age of seventeen years and three and a half months, and was in the employ of said defendant

as one of the attendants in charge of said tables "B" and "C," and was as such attendant under the immediate supervision of said yard foreman, and together with the other attendants was charged by said defendant, by its yard foreman, with the duty of removing lumber and boards as the same from time to time reached the east side of said table "B," and was also charged by defendant, by its said yard foreman, with the duty of seeing that the lumber and boards dropped from said table "A" should be so carried across said table "B" or from said respective tables "C" and "B" as ultimately to reach said east end of table "C," there to be removed in the manner aforesaid. That it was particularly made, by defendant through its said yard foreman, the duty of plaintiff and said other attendants to prevent any disorder or complication in said operations, and particularly to prevent the clogging of the same in any manner.

That plaintiff had been so employed as one of the attendants about said tables "B" and "C" during the two weeks immediately preceding the hereinafter mentioned accident, and that two weeks before its occurrence and while plaintiff was by defendant so employed a board had been caught under one of the pairs of said "skids" and had caused a clogging, accumulation and jam of lumber upon said table "B," and that said yard foreman, being then present, then and there directed plaintiff [20] to "get up and get that out," then and there referring to said board there so caught, and had then and there intentionally given plaintiff to understand that plain-

tiff was required by defendant company, as often as and whenever such clogging should occur, or boards be so caught between or under said "skids," to mount up upon said table "B," and amid the falling boards and between the revolving rollers thereon, and to disentangle and remove the boards and lumber so caught or that might become so caught; and that thereupon and in the presence of such yard foreman, and under his express orders, the plaintiff had then and there climbed upon said table "C" and stepped therefrom over said "dog-roller," and to and upon said table "C" and removed and disentangled the lumber then and there caught.

That on said 30 day of July, 1907, and in the course of the operation of said mill, a certain board was sawed to a length of six feet or thereabouts and was delivered from said table "A" and upon the "skids" extending from said platform to said table "B." That in sliding down said skids and by reason of the shortness of said board one end of the same fell between two pairs of said "skids" in such manner that said end of said board became caught in one of said pairs of "skids" while the other end of said board fell across said table "B" and one of the rollers thereon, and became wedged in that position, and thereby formed an obstruction to the passage of other lumber along or off said table "B" to and upon said table "C" and caused lumber to pile up and accumulate upon said table "B" and form a jam there.

That when said board became caught as aforesaid on said 30 day of July, 1907, there was no ladder or

other ready or available means of climbing from the ground directly to or upon said table "B"; but that the only practicable way for a workman or attendant to get upon or reach the top of said table "B" [21] was to climb upon said table "C" and to step thence across the space intervening between the said table "C" and said table "B" and across and over said "dog-roller" to and upon said table "B," in the same manner in which plaintiff had done two weeks or thereabouts theretofore as hereinbefore set forth. That accordingly, on said 30 day of July, 1907, plaintiff, in the performance of his duty to keep said table "B" free from obstruction, upon observing said board so caught and wedged in the position afore-said, climbed up upon said table "C" and undertook and attempted to step therefrom across and over said "dog-roller" and to and upon said table "B," there to clear away said board so caught and wedged beneath said "skids"; but that plaintiff, without fault on his part, failed in the effort to step over said "dog-roller" and said plank "X," and that then and there, and while he was endeavoring so to do, his right foot was carried between said "dog-roller" and said plank "X" and so crushed and maimed as to necessitate the amputation of all of same save the heel and ankle only.

That at the time plaintiff was so injured said yard foreman was not present nor in sight of said table "B," nor of said table "C" nor of plaintiff. That plaintiff at the time of said injury was inexperienced in the use of machinery, and by reason of his tender years and such inexperience did not realize or un-

derstand the danger incident to attempting to step or climb over said "dog-roller" or upon said table "B" in the manner aforesaid or to attempt to perform the work so assigned to him by said defendant's said yard foreman.

And that at the time of said accident and notwithstanding the complication caused upon said table "B" by the catching of said board and while plaintiff was seeking as aforesaid to climb and step from said table "C" over said "dog-roller" to [22] said table "B," boards and lumber continued constantly to drop from said table "A" down across said "skids" to and upon both said table "B" and said table "C."

That defendant at all times herein mentioned was grossly negligent as foresaid in failing to provide plaintiff, as aforesaid, with a safe place to work; and by causing plaintiff to be about and upon said apparatus and machinery without providing fit and proper safeguards therefor, and by and through its yard foreman in allowing plaintiff, who was then and there a minor as aforesaid, to believe that the services so required of him were ordinary and safe, whereas the same were in fact fraught with great and extraordinary danger.

That by reason of the premises plaintiff was compelled to be and remain at a hospital and sanitarium for a period of five weeks immediately following said 30 day of July, 1907, and for necessary board, lodging and treatment at said hospital and sanitarium and for surgical and medical aid thereat and atten-

tion, including the cost of the amputation of plaintiff's said right foot, plaintiff incurred liability for the reasonable sum and amount of \$485.

That by reason of said injury plaintiff was for a long time, to wit, six months or thereabouts immediately following said 30 day of July, 1907, unable to perform any work or labor whatsoever, and lost thereby the value of his time for such period of six months, to his damage in the sum of \$400.

That by reason of said injury, plaintiff has become lame and crippled and will so remain during the whole of his natural life, and that his capacity for earning a livelihood has become thereby greatly impaired and diminished and will continue to be and remain so impaired and diminished, and that he has been by said injury subjected to great pain and suffering in body and mind, all to his damage in the sum of \$25,000. [23]

WHEREFORE, plaintiff demands judgment against defendant for the sum and amount of \$25,885, and costs herein.

HAINES & HAINES,
Attorneys for Plaintiff.

State of California,
County of San Diego,—ss.

H. C. McCann, being duly sworn, says: That *he* the plaintiff named in the foregoing complaint; that he has read said complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated on his information and belief, and as to those matters

that he believes it to be true.

JESSE F. McCANN,
Guardian for Plaintiff, H. C. McCann.

Subscribed and sworn to before me this 30th day
of July, 1908, by H. C. McCann.

[Seal] JNO. P. BURT,
Notary Public in and for the County of San Diego,
State of California.

[Endorsed]: No. 14,693. Dept. No. In the
Superior Court of the State of California, in and for
the County of San Diego. H. C. McCann, by Jesse
F. McCann, His Guardian *ad Litem*, Plaintiff, vs.
Benson Lumber Company, a corporation, Defendant.
Complaint. (Copy.) Filed July 30, 1908, Wm. H.
Francis, County Clerk. By J. B. McLees, Deputy.
Haines & Haines, Attorney for Plaintiff. Gibson,
Trask, Dunn & Crutcher, Entrance Room 718 Pacific
Electric Building, Cor. 6th and Main Sts., Los An-
geles, Cal., Attorneys for [24]

*In the Superior Court of the State of California, in
and for the County of San Diego.*

H. C. McCANN, by JESSE F. McCANN, His
Guardian *ad Litem*,
Plaintiff,

vs.

BENSON LUMBER COMPANY, a Corporation,
Defendant.

Demurrer.

Now comes defendant in the above-entitled action

and demurs to the complaint herein, and for grounds of demurrer states:

I.

That the complaint herein does not state facts sufficient to constitute a cause of action.

GIBSON, TRASK, DUNN & CRUTCHER,
WRIGHT, SCHOONOVER & WINNEK,
Attorneys for Defendant.

[Endorsed]: No. Dept. No. In the Superior Court of County of San Diego, State of California. H. C. McCann, by Jesse F. McCann, Guardian *ad Litem*, Plaintiff, vs. Benson Lumber Co., Defendant. Demurrer. Filed Jan. 5, 1909. Wm. H. Francis, Co. Clerk. By J. B. McLees, Deputy. Received copy of the within demurrer this 5th day of January, 1909, Haines & Haines, Attorneys for Plaintiff. Gibson, Trask, Dunn & Crutcher, Entrance Room, 718 Pacific Electric Building, Cor. 6th and Main Sts., Los Angeles, Cal., Attorneys for Defendant. [25]

*In the Superior Court of the State of California, in
and for the County of San Diego.*

H. C. McCANN, by JESSE F. McCANN, His
Guardian *ad Litem*,

Plaintiff,

vs.

BENSON LUMBER COMPANY, a Corporation,
Defendant.

Petition [for Removal].

To the Honorable, the Superior Court of the County of San Diego, State of California:

Your petitioner, the Benson Lumber Company, a corporation, the defendant in the above-entitled action, respectfully shows, and your petitioner respectfully avers:

I.

That your petitioner in the above-named action was at the time of the commencement of this action, and ever since has been, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, and was at the time of the commencement of this action, and ever since continuously has been, and now is, a citizen and resident of the said State of Oregon.

II.

That this action was commenced on the twenty-sixth day of December, 1908, in the said Superior Court of the County of San Diego, State of California.

III.

That the summons, together with a copy of the complaint in said action, was served on petitioner, in the city of San Diego, county of San Diego, and State of California, on the twenty-sixth day of December, 1908, and not before.

IV.

That under and by virtue of the laws of the State of California [26] and the rules of the said Superior Court, your petitioner, defendant in this ac-

tion, always has been and is required to appear, answer and plead to the complaint in said action, within ten days after the service of summons in the said action, that is to say, on or before the fifth day of January, 1909, and not before.

V.

That your petitioner has not in any manner answered, demurred or plead to the said action; that no issue of fact or law has been raised or joined thereon, and that the time allowed by law and the rules of the said Superior Court of the County of San Diego, State of California, for your petitioner to demur, answer or plead therein, has not expired and will not expire until the fifth day of January, 1909; and that simultaneously with the filing of this petition, your petitioner has filed in the said action and served on the attorneys for plaintiff its demurrer in writing to the complaint therein.

VI.

That this suit always has been and is one of a civil nature, in law, of which the Circuit Courts of the United States attain jurisdiction, by the Act of Congress of the United States, entitled An Act to correct the enrollment of an Act approved March 3d, 1887, entitled An Act to amend sections 1, 2, 3 and 10 of an Act to determine the jurisdiction of the Circuit Courts of the United States and to regulate the removal of causes from State Courts, and for other purposes, approved March 3d, 1875, approved August 13th, 1888; that this action is now pending in the said Superior Court of the County of San Diego, State of California, and that the matter in dispute

therein exceeds, exclusive of interest and costs, the sum and value of two thousand dollars, that is to say, the action is brought to recover the sum of twenty-five thousand eight hundred and eighty-five dollars, besides costs. [27]

VII.

That the plaintiff herein was at the time of the commencement of this action, ever since continuously has been and now is a citizen and resident of the city of San Diego, in the county of San Diego, in the State of California, and that the guardian *ad litem* of plaintiff, Jesse F. McCann, was at the time of the commencement of this action, ever since continuously has been, and now is a resident and citizen of the said county of San Diego in the State of California; and that your petitioner, the defendant herein, was at the time of the commencement of this action, even since continuously has been, and now is, a corporation organized and existing under the laws of the State of Oregon, and was at the time of the commencement of this action, ever since continuously has been, and now is, a resident of the said State of Oregon, and was at the time of the commencement of this action, ever since continuously has been, and now is, a citizen of the said State of Oregon; and that this action at the time of its commencement, was, ever since continuously has been, and now is, a controversy between citizens of different States, to wit, a controversy between your petitioner, the defendant herein, a citizen of the said State of Oregon, and the plaintiff *here*, a citizen of the State of California.

VIII.

That there was at the time of the commencement of this action, ever since continuously has been, and now is, a controversy herein which always has been and now is wholly between citizens of different States, which can be fully determined as between them; that such controversy always has been, during all said last-mentioned times, and now is, between the plaintiff, a citizen of the State of California, aforesaid, and your petitioner, the defendant, a citizen and resident of the said State of Oregon, as aforesaid, and that the plaintiff, and his guardian *ad* [28] *litem*, as aforesaid, and your petitioner, are the only parties to this action.

IX.

That this petition is made and filed before your petitioner ever has been or is required by law, or by any law of the State of California, or by any rule of the said Superior Court of the County of San Diego, in the State of California, in which this suit is brought and is pending, to appear, or demur, or answer, or plead to the declaration or complaint of plaintiff herein, and your petitioner desires to remove the same from the said Superior Court to the Circuit Court of the United States for the Southern District of California, in the Ninth Judicial Circuit, the same being the district in which this suit has always been and now is pending; that pursuant to the provisions of the Act of Congress of the United States, approved March 3d, 1887, entitled, An Act to amend the Act of Congress approved March 3d, 1875, entitled, An Act to determine the jurisdiction

of the Circuit Courts of the United States and to regulate the removal of causes from State Courts, and for other purposes, and to further regulate the jurisdiction of the Circuit Courts of the United States, and for other purposes, and all acts explanatory and amendatory thereof, and to correct the same, and particularly An Act approved August 13th, 1888, to correct the enrollment of said Act of March 3d, 1887; and that your petitioner is ready and willing to give all good and sufficient surety which this Court may direct, and to do all such acts and things as may be required to be done by the provisions of the said Acts of the Congress of the United States, on the removal of a suit into a court of the United States.

X.

That your petitioner has made and filed with this petition and hereby offers herewith a good and sufficient surety, according [29] to the provisions of the said Acts of Congress, and bond, made and executed by the National Surety Company, a corporation, duly organized and existing under and by virtue of the laws of the State of New York, and duly licensed for the purpose of making, guaranteeing and becoming surety upon bonds and undertakings required or authorized by the laws of the State of California, as surety, in the sum of one thousand dollars, conditioned that your petitioner shall enter in the Circuit Court of the United States for the Southern District of the State of California, in and for the Ninth Judicial Circuit on the first day of the session next ensuing hereafter, a copy of the record in said suit, and shall pay all costs that the said Court shall

award, if the said Court shall hold that this suit was improperly or wrongfully removed thereto.

THEREFORE, your petitioner prays this Honorable Court to accept this petition and said bond, and to proceed no further herein, except to make an order of removal, the cause and record herein to be removed into the Circuit Court of the United States for the Southern District of California, in the Ninth Judicial Circuit.

And your petitioner will ever pray, etc.

BENSON LUMBER COMPANY,

By O. J. EVENSON,

Its. Vice-Pres.

GIBSON, TRASK, DUNN & CRUTCHER,

WRIGHT, SCHOONOVER & WINNEK,

Attorneys for Petitioner. [30]

State of California,

County of San Diego,—ss.

O. J. Evenson, being first duly sworn, on oath deposes and says that he is an officer, to wit, the vice-president, of the Benson Lumber Company, a corporation, and defendant in the above-entitled action; that he has read the foregoing petition in the said action, and knows the contents thereof, and that the same is true of his own knowledge, except in matters that are therein stated on information and belief, and that as to such matters he believes it to be true.

O. J. EVENSON.

Subscribed and sworn to before me this 5th day of January, A. D. 1909.

[Seal]

E. V. WINNEK,

Notary Public in and for the County of San Diego,
State of California.

[Endorsed]: No. 14,693. Dept. No. 1. In the Superior Court of County of San Diego, State of California. H. C. McCann, by His Guardian *ad Litem*, Jesse F. McCann, Plaintiff, vs. Benson Lumber Co., Defendant. Petition for Removal to Cir. Ct. U. S. Filed Jan. 5, 1909. Wm. H. Francis, Co. Clerk. By J. B. McLees, Deputy. Gibson, Trask, Dunn & Crutcher, Entrance Room, 718 Pacific Electric Building, Cor. 6th and Main Sts., Los Angeles, Cal., Attorneys for Defendant. [31]

*In the Superior Court of the State of California, in
and for the County of San Diego.*

H. C. McCANN, by JESSE F. McCANN, His
Guardian *ad Litem*,

Plaintiff,

vs.

BENSON LUMBER COMPANY, a Corporation,
Defendant.

Bond on Removal of Cause.

KNOW ALL MEN BY THESE PRESENTS:
WHEREAS, the defendant in the above-entitled action, the Benson Lumber Company, a corporation, is about to apply to the above-entitled court to remove the said action to the Circuit Court of the United States for the Southern District of California, and

for further proceedings, on the grounds in said petition set forth, and asking that all further proceedings in the said Superior Court be stopped; and desires this bond for the purposes of said proceedings, according to the statute relative to the removal of causes from State to Federal Courts;

NOW, THEREFORE, in consideration of the premises and of the making of such application to remove the said cause, the undersigned, the National Surety Company, a corporation duly organized under and by virtue of the laws of the State of New York, and duly licensed for the purpose of making, guaranteeing, and becoming surety upon bonds and undertakings required or authorized by the laws of the State of California, as surety, does hereby undertake and promise, on the part of the said Benson Lumber Company, a corporation, petitioner, to remove the above-entitled action to the said Circuit Court of the United States for the Southern District of California, that the said petitioner will [32] enter and file in the said Circuit Court of the United States, on or before the first day of the next ensuing session of the said Court, a transcript of the record in said Superior Court, in the above-entitled action, and that said defendant and petitioner will pay all costs to be paid or costs that may be awarded therein, in the said Circuit Court of the United States aforesaid, if the said Circuit Court shall hold that the said suit was wrongfully or improperly removed thereto, not exceeding the sum of one thousand dollars, for which amount the undersigned, National Surety Company, acknowledges itself and its successors

jointly and severally bound by these presents.

IN WITNESS WHEREOF, the National Surety Company has caused its name to be hereunto subscribed, and its seal to be hereunto affixed, by representatives thereunto duly authorized, this 4th day of January, A. D. 1909.

[Corporate Seal]

NATIONAL SURETY COMPANY,

By CHAS. SEYLER, Jr.,

Resident Vice-President,

SAM BEHRENDT,

Resident Secretary.

State of California,

County of Los Angeles,—ss.

On this 4th day of January, A. D. 1909, personally, before me, a notary public in and for the said county of Los Angeles, in the State of California, duly commissioned and sworn, appeared Charles Seyler, Jr., and Sam Behrendt, known to me to be the resident vice-president and resident assistant secretary respectively of the National Surety Company, a corporation, who executed the within instrument, and acknowledged to me that the said National Surety Company executed the same, and that they subscribed the name of the said National Surety Company thereto, as principal; and the said Charles Seyler, Jr., and Sam Behrendt, [33] being first duly sworn, did depose and say that they reside in the city of Los Angeles, county of Los Angeles, State of California, and that they are respectively the resident vice-president and resident assistant secretary of the said

National Surety Company; that they know the corporate seal of said company; that the said National Surety Company is duly and legally incorporated under the laws of the State of New York; that said company has complied with the provisions of the Act of Congress of August 13th, 1894; that the seal affixed to the foregoing bond is the corporate seal of said company and was thereto affixed by order and authority of the Board of Directors of said Company and that they signed their names thereto by like order and authority of the board of directors of said company; that the assets of said company, unencumbered and liable to execution exceed its claims, debts and liabilities of every nature whatsoever, by more than the sum of one thousand dollars.

CHAS. SEYLER, Jr.,

Resident Vice-President.

SAM BENRENDT,

Resident Asst. Secretary.

Sworn to and acknowledged before me, and subscribed in my presence, this January 4th, 1909.

[Seal]

EDWIN J. LOEB,

Notary Public in and for the County of Los Angeles,
State of California.

The above bond and surety thereon are hereby accepted and approved, this 5th day of January, 1909.

W. R. GUY,

Judge.

[Endorsed]: No. ——. Dept. No. ——. In the Superior Court of County of San Diego, State of California. H. C. McCann, by Jesse F. McCann,

Guardian *ad Litem*, Plaintiff, vs. Benson Lumber Co., Defendant. [34] Bond on Removal. Filed Jan. 5, 1909. Wm. H. Francis, Co. Clerk. By J. B. McLees, Deputy. Gibson, Trask, Dunn & Crutcher, Entrance Room, 718 Pacific Electric Building, Cor. 6th and Main Sts., Los Angeles, Cal., Attorneys for Defendant. [35]

*In the Superior Court of the State of California, in
and for the County of San Diego.*

H. C. McCANN by JESSE F. McCANN, His
Guardian *ad Litem*,

Plaintiff,

vs.

BENSON LUMBER COMPANY, a Corporation,
Defendant.

Order [of Removal].

It appearing that the defendant in the above-entitled action has filed its petition in due form therein for the removal of said cause to the Circuit Court of the United States for the Southern District of California, for the Ninth Circuit, and has also filed a bond in due form, on said removal, for the sum of one thousand dollars, with due and sufficient surety, duly approved by this Court,—

IT IS ORDERED, that no further proceedings be taken in the said cause, and that same be removed accordingly.

Dated, January 6th, 1909.

W. R. GUY,
Judge.

[Endorsed]: Entered in Minutes. No. 14,693. Dept. No. 1. In the Superior Court of County of San Diego, State of California. *H. C. McCann*, by *Jesse F. McCann*, Guardian *ad Litem*, Plaintiff, vs. *Benson Lumber Co.*, Defendant. Order for Removal of Cause to U. S. Cir. Ct. Filed Jan. 6, 1909. Wm. H. Francis, Co. Clerk. By W. Wirt Francis, Deputy. Gibson, Trask, Dunn & Crutcher, Entrance Room 718 Pacific Electric Building, Cor. 6th and Main Sts., Los Angeles, Cal., Attorneys for Defendant. [36]

[Endorsement in U. S. Circuit Court]: No. 1478. U. S. Circuit Court, Ninth Circuit, Southern District of California, Southern Division. *H. C. McCann*, by *Jesse F. McCann*, His Guardian *ad Litem*, vs. *Benson Lumber Company*. Certified Transcript on Removal from Superior Court of San Diego County. Filed Jan. 7, 1909. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. [37]

[Order on Demurrer.]

At a stated term, to wit, the January Term, A. D. 1909, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, Southern Division, held at the courtroom, in the City of Los Angeles, on Monday, the nineteenth day of April, in the year of our Lord one thousand nine hundred and nine. Present: The Honorable OLIN WELLBORN, District Judge.

No. 1478.

H. C. McCANN by JESSE F. McCANN, His
Guardian *ad Litem*,

Plaintiff,

vs.

BENSON LUMBER COMPANY, a Corporation,
Defendant.

This cause coming on this day to be heard on defendant's demurrer to plaintiff's complaint, James Stark Bennett, Esq., appearing on behalf of plaintiff's counsel, and defendant being representing by Gibson, Trask, Dunn & Crutcher, and said demurrer having been presented by counsel for defendant, and court thereupon, at the hour of 12:15 o'clock P. M., having taken a recess until the hour of 2:15 o'clock P. M. of this day, and now, at the hour of 2:15 o'clock P. M., Court having reconvened, and counsel being present as before, and said demurrer having been further argued on behalf of defendant, said demurrer is now confessed by counsel for plaintiff, whereupon it is ordered by the Court, that plaintiff have twenty (20) days' time in which to amend his said complaint.

[Endorsed]: Filed Sep. 18, 1913. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. [38]

In the Circuit Court of the United States, Ninth Circuit, in and for the Southern Division of the Southern District of California.

AT LAW—No. 1478.

H. C. McCANN by JESSE F. McCANN, His
Guardian *ad Litem*,

Plaintiff,

vs.

BENSON LUMBER COMPANY, a Corporation,
Defendant.

**Amended Complaint for Damages for Personal
Injuries.**

Comes now the plaintiff above named, by Jesse F. McCann, his guardian *ad litem*, and by leave of Court first had and obtained, files this his amended complaint, and, for cause of action against the defendant above named alleges:

1. That plaintiff, H. C. McCann, is a minor of the age of nineteen years. That on the 29th day of July, 1908, the Superior Court of the County of San Diego, State of California, duly made and entered its order in and by which it appointed said Jesse F. McCann guardian *ad litem* for plaintiff H. C. McCann, for the purposes of conducting this action.

2. That defendant, Benson Lumber Company, at all times herein mentioned was and now is a corporation organized and existing under and by virtue of the laws of the State of Oregon, with its principal place of business in the city of Portland in said State. That at all of said times said defendant maintained,

owned and operated, and still maintains, owns and operates at the city of San Diego, State of California, a mill and yard, with machinery, chutes and platforms for sawing and converting, and [39] was engaged in sawing and converting logs into lumber and disposing of the same.

3. That at all times herein mentioned said mill was so constructed and operated by defendant that as the lumber in said mill was cut into lengths, defendant caused the same to pass sideways from said mill down a chute made of parallel skids leading from the sawing table in said mill to the outside platform, and defendant maintained and caused to operate and revolve in the surface of said outside platform, rollers carrying dogs or projections for the purpose of carrying said lumber lengthwise at right angles from the direction in which it came to the said outside platform until it dropped on to a loading platform, whence it was loaded on to wagons and carted away.

4. That on the 30th day of July, 1907, plaintiff H. C. McCann was of the age of 17 years and 3 months, or thereabouts, and, at said time, he was in the employ of said defendant as an attendant upon and about said outside platform. That in the course of his said employment plaintiff was required and directed by defendant to keep said lumber moving over said chute from said mill and along said outside platform and to see to it that said lumber did not clog, jam or pile up in said chute and on said outside platform. That whenever said lumber did clog, jam or pile up in said chute and on said outside platform, plaintiff, in the course of said employment, was re-

quired by defendant to go upon said outside platform while the said rollers were in operation and revolving on the surface of said platform and to loosen and disentangle the said lumber which had become so clogged and piled up, and to again start and keep said lumber moving along said chute and said outside platform.

5. That on the said 30th day of July, 1907, said outside platform was a dangerous and unsafe place in which to work, that defendant maintained said outside platform in a defective [40] and unsafe condition, without exercising ordinary or any care to see that the same was a reasonably safe place for said plaintiff to work and without providing fit and proper safeguards therefor. That at said times defendant maintained said chute in a defective and unsafe condition, without exercising ordinary or any care to see that it did not render unsafe the place defendant had provided for plaintiff to work in. That at said time defendant failed to use ordinary or any care to provide a safe way or safe appliances for the use of plaintiff in mounting and going upon said outside platform. That plaintiff did not know of the perils and dangers to which he was so exposed by defendant while doing his work as aforesaid, and defendant failed and neglected to warn plaintiff of the danger and peril to him incident to his said employment and work. That at said time defendant knew and had the means of knowing that said outside platform was an unsafe place for plaintiff to work in, that said chute rendered said outside platform an unsafe place in which to work, and that no safe way or safe appliances had been furnished for plaintiff's use in mount-

ing and going upon said outside platform.

6. That on said July 30, 1907, while plaintiff, in the course of his said employment, was mounting and going upon said outside platform to disentangle the lumber which was clogged, jammed and piled up on said outside platform, by reason of defendant's negligence in failing to provide for said plaintiff a reasonably safe place in which to work, by reason of defendant's negligence in failing to provide a proper and sufficient chute, by reason of said defendant's negligence in failing to provide proper ways and appliances for mounting and going upon said outside platform, by reason of defendant's negligence in failing to warn plaintiff of the danger connected with said employment, and by reason of defendant's negligence in failing to instruct plaintiff in what manner he could safely perform his [41] said duties, plaintiff was caught by said first roller revolving in the surface of said outside platform and thrown down on said outside platform, and his right foot torn, bruised, wounded and mangled, by reason of which injury plaintiff was required to and did have said right foot amputated.

7. That in consequence of the said injuries caused by the want of care and said negligence of defendant, as aforesaid, plaintiff has suffered great bodily pain and mental anguish, and has suffered the loss of his right foot, has become lame and crippled and will so remain permanently during the remainder of his natural life; that thereby his capacity for earning a livelihood has become impaired and diminished and will continue to remain so impaired and diminished,

to his damage in the sum of \$25,000.

8. That in consequence of said injuries caused by said want of care and negligence of defendant, as aforesaid, plaintiff was compelled to be and remain at a hospital and sanitarium for a period of five weeks immediately following said 30th day of July, 1907, and to incur, and did incur, liability for necessary board, lodging and treatment at said hospital and sanitarium, and for surgical and medical aid and attention thereat, in the sum of \$485.00. That the reasonable value of said board, lodging, treatment and surgical and medical aid and attention for which said liability was so incurred by plaintiff was and is said sum of \$485.00.

WHEREFORE, plaintiff demands judgment against defendant for the sum of \$25,485, and costs.

HUNSAKER, BRITT & FLEMING,
HAINES & HAINES,

Attorneys for Plaintiff. [42]

State of California,
County of San Diego,—ss.

H. C. McCann, being first duly sworn, deposes and says: That he is the plaintiff named in the foregoing amended complaint; that he has read said amended complaint and knows the contents thereof, and that the same is true to his own knowledge except as to those matters which are therein stated upon information or belief, and as to those matters that he believes it to be true.

H. C. McCANN.

[Sea1]

Notary Public in and for the County of San Diego,
State of California.

[Endorsed]: At Law. No. 1478. In the United States Circuit Court, Ninth Circuit, Southern District of California, Southern Division. H. C. McCann by Jesse F. McCann, His Guardian *ad Litem*, Plaintiff, vs. Benson Lumber Company, a Corporation, Defendant. Amended Complaint for Damages for Personal Injuries. Received a copy of the within this 11th day of May, 1909. Gibson, Trask, Dunn & Crutcher. Filed May 11, 1909. Wm. M. Van Dyke, Clerk. Chas N. Williams, Deputy. Hunsaker, Britt & Fleming. Rooms 714-719 H. W. Hellman Building, Los Angeles, California, Attorneys for Plaintiff.

[43]

In the Circuit Court of the United States, Ninth Circuit, in and for the Southern Division of the Southern District of California.

AT LAW—No. 1478.

H. C. McCANN, by JESSE F. McCANN, His
Guardian *ad Litem*,

Plaintiff,

vs.

BENSON LUMBER COMPANY, a Corporation,
Defendant.

Demurrer to the Amended Complaint.

Now comes the defendant in the action above entitled and demurs to the amended complaint of plaintiff on file herein, and for grounds of demurrer, shows:

I.

That said complaint does not state facts sufficient to constitute a cause of action.

II.

That said amended complaint is uncertain in this, that it is impossible to ascertain from said amended complaint how or in what manner the said platform was dangerous or unsafe or was a dangerous or unsafe place in which to work, or how or in what manner defendant maintained said platform in a dangerous condition, or how or in what manner defendant failed to exercise ordinary care to see that the same was reasonably safe, or how or in what manner defendant failed to use ordinary care or failed to furnish safe appliances for plaintiff, and that it is impossible to ascertain from said amended complaint how defendant could have guarded said platform or what appliances defendant [44] should have used to guard the same or to make the same safe.

III.

That said amended complaint is further uncertain in this, that it is impossible to ascertain from said amended complaint why or how plaintiff did not know of the said alleged dangers to which he was exposed, it not being alleged that the said dangers, if any at all, were concealed or of such character that a

person of plaintiff's years could not have seen or understood such dangers, and it not being alleged of what the dangers consisted.

IV.

That said amended complaint is further uncertain in this, that it is impossible to ascertain therefrom what appliances the defendant could have used or furnished to plaintiff to use in mounting the outside of said platform, which it did not furnish.

V.

That said amended complaint is ambiguous, in the same respects and for the same reasons, for which it is above shown to be uncertain.

VI.

That said amended complaint is unintelligible, in the same respects and for the same reasons for which it is above shown to be uncertain.

GIBSON, TRASK, DUNN & CRUTCHER,
Attorneys for Defendant.

[Endorsed]: No. 1478. U. S. Circuit Court, Ninth Circuit, Southern District of California, Southern Division. H. C. McCann, etc., Plaintiff, vs. Benson Lumber Co., Defendant. Demurrer to the Amended Complaint. Filed May 24, 1909. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Received copy of the within demurrer this 24th day of May, 1909. Haines & Haines, and Hunsaker, Britt & Fleming, Plaintiff. Gibson, Trask, Dunn & Crutcher, Los Angeles, Cal., Attys. for Defendant. [45]

In the Circuit Court of the United States, Ninth Circuit, in and for the Southern Division of the Southern District of California.

AT LAW—No. 1478.

H. C. McCANN, by JESSE F. McCANN, His
Guardian *ad Litem*,

Plaintiff,

vs.

BENSON LUMBER COMPANY, a Corporation,
Defendant.

**Second Amended Complaint for Damages for
Personal Injuries.**

Comes now the plaintiff above named, by Jesse F. McCann, his guardian *ad litem*, and by leave of Court first had and obtained, files this his second amended complaint, and for cause of action against the defendant above named, alleges:

1. That plaintiff, H. C. McCann, is a minor of the age of nineteen years. That on the 29th day of July, 1908, the Superior Court of the County of San Diego, State of California, duly made and entered its order in and by which it appointed said Jesse F. McCann guardian *ad litem* for plaintiff, H. C. McCann, for the purposes of conducting this action.

2. That defendant, Benson Lumber Company, at all times herein mentioned was and now is a corporation organized and existing under and by virtue of the laws of the State of Oregon, with its principal place of business in the city of Portland, in said

State. That at all of said times said defendant maintained, owned and operated and still maintains, owns and operates at the city of San Diego, State of California, a mill and yard, with machinery, chutes and platforms for sawing and converting, and was engaged in sawing and converting, logs into lumber and disposing of the same. [46]

3. That at all times herein mentioned said mill was so constructed and operated by defendant that logs in continuous succession were delivered upon a carrier and carried by it backwards and forwards until cut into lumber by the great band-saw of said mill; that next such lumber was delivered by the connected machinery of the mill in continuous succession to a sawing-table inside of said mill known as the "trimmer," and there cut into lengths; and that defendant next caused the said lumber to be carried by further connected machinery of the mill from said "trimmer" sidewise in constant succession from said mill down a chute, otherwise known as the "slide," made of parallel skids leading from said "trimmer" in said mill downward to a platform outside of the mill, otherwise known as the "push-table"; that at all said times defendant, by further connected machinery of the mill, maintained and caused to operate and revolve in the surface of said "push-table" rollers including a roller studded with "dogs," projections or spikes for the purpose of carrying said lumber lengthwise at right angles from the direction in which it came sidewise, in unintermitting succession, to and upon said "push-table," until it dropped from said "push-table" two feet

or thereabouts, downward upon a loading table, otherwise known as the "carrying-table," whence it was loaded, as fast as delivered, by the employees of defendant upon wagons or trucks and carried away. That the whole process of converting logs into lumber, from the time when such logs in quick succession were delivered upon the carrier for the band-saw until the lumber cut from them was passed through said "trimmer" down said skids upon said "push-table" and over it upon said "carrying-table," and thence loaded upon trucks, was a continuous one; and that it was required by defendant, in its operation of its said mill, that such process should be continuous and uninterrupted throughout; that in order that such process should be so continuous [47] and uninterrupted, it was necessary to keep the lumber moving down said "slide," and over said "push-table" and upon said "carrying-table" and to prevent any accumulation, clogging or jamming of lumber, either upon said "slide," said "push-table," or said "carrying-table," and to have said lumber delivered regularly, so as to make it possible to keep a succession of trucks loaded therewith, and get the same out of the way. And plaintiff avers that at all said times such clogging, piling up and jamming of lumber was of frequent occurrence.

4. That on the 30 day of July, 1907, plaintiff, H. C. McCann, was of the age of 17 years and three months or thereabouts, and, at said time, he was in the employ of said defendant as an attendant upon and about said "slides" and said outside platform, so called the "push-table" and said loading platform,

so otherwise known as the "carrying-table."

That in the course of his said employment plaintiff was required and directed by defendant, and defendant made it part of his work, to keep said lumber moving on said chute or "slide" from said mill and along said outside platform, so otherwise known as the "push-table," and to see to it that said lumber did not clog, jam or pile up on said "slide" or on said "push-table," and to see that the lumber was kept moving in a continuous stream as delivered from the said "trimmer" inside of said mill upon said "slide" and thence downward upon said outside "push-table" and from it to said loading platform or "carrying-table."

That whenever said lumber so coming in a continuous stream did clog, jam, or pile up on said chute, otherwise called "the slide," or on said outside platform, otherwise called "the push-table," plaintiff, in the course of his employment, was required by defendant to go upon said outside "push-table" while said rollers were in operation and revolving on the surface of said platform, and while lumber was being delivered in a continuous [48] stream from the inside of the mill, to loosen and disentangle the said lumber, which had become so clogged and piled up, and to again start, and keep said lumber moving along in continuous stream down said "slide" and over said "push-table" down to and upon said loading platform, otherwise known as the "carrying-table"; that the defendant provided no other means for releasing, loosening or disentangling lumber when it became so clogged and piled up than for its

employees to get on and upon said "push-table" to there accomplish the releasing, loosening and disentangling of the lumber which had become so clogged and piled up. And that defendant at the time of the injury inflicted upon plaintiff as hereinafter stated had provided no other means for mounting upon said "push-table" than to step up and upon the same from said "carrying-table" over said "dog-roller," revolving at the end of said "push-table" next to said "carrying-table."

5. That on said 30 day of July, 1907, said outside platform or "push-table" was a dangerous and unsafe place on, in and with which to work; that defendant maintained said outside platform or "push-table" in a defective and unsafe condition, without exercising ordinary or any care to see that the same was a reasonably safe place for plaintiff to work, and without providing fit and proper safeguards therefor. That at said times defendant maintained said chute or "slide" in a defective and unsafe condition, without exercising ordinary or any care to see that it did not render unsafe the place defendant had provided for plaintiff to work in. That at said time defendant did not have or provide the inclined plane of said chute or "slide" with a sufficient number of skids or other device to properly carry the lumber from said mill to said outside platform or "push-table"; by reason of which accumulations, jams and clogs of lumber were liable to occur, and by reason of which said outside platform or "push-table" and said loading platform or "carrying-table" were [49] unsafe places at, on and about which to require plain-

tiff to work. That said outside platform or "push-table" was then and there further defective and unsafe in that defendant did not have or provide a reasonably safe place or means of approach thereto, or for mounting or going thereon, or to protect plaintiff from said "dog-roller." That at said time said outside platform or "push-table" was a dangerous and unsafe place at, on or about which to require plaintiff to work, by reason of the fact that defendant then and there operated said mill, chute or "slide," and said outside platform or "push-table," without requiring said rollers to be stopped and without interrupting the stream of lumber pouring out from said "trimmer" while the lumber clogged, jammed and piled upon said outside platform or "push-table" was or could be loosed and released. That the loosening and releasing of the lumber, when so clogged, piled up and jammed, was required to be done when said mill was in full operation as aforesaid; that great noise and confusion were attendant upon such full operation; and that the work and labor of loosening and releasing the lumber when so clogged, jammed and piled up required extreme and desperate haste, and the exercise of great and violent muscular exertion, and under said circumstances was of an extremely distracting character; that said work was in all respects unsuitable in character and under said circumstances under which it was performed, for anyone, and particularly for a youth of the plaintiff's age and experience. That at said time defendant failed to use ordinary or any care to provide a safe way or safe appliances for the use of plaintiff

in mounting and going upon said outside platform or "push-table." That plaintiff, being then and there a youth as aforesaid, had no experience of, and did not know of, the perils and dangers to which he was so exposed by defendant while doing his work as aforesaid, and that defendant failed and neglected [50] to warn plaintiff, notwithstanding his said youth and inexperience, of the dangers and perils to him incident to his said employment and work; but with full knowledge of plaintiff's youth and inexperience and of said circumstances, carelessly, negligently and recklessly required plaintiff to expose himself to said perils and dangers. That at said time defendant knew and had the means of knowing that said outside platform or "push-table" was an unsafe place for plaintiff to work in; that said chute or "slide" rendered said outside platform an unsafe place in which to work; that the uninterrupted stream and discharge of lumber from said mill rendered said work perilous and unsafe, and that no safe way or safe appliances had been furnished for plaintiff's use in mounting and going upon said outside platform, and that by reason of plaintiff's said youth and inexperience and the character of said work as aforesaid, he was peculiarly and especially exposed and liable to injury in the performing of his said work.

6. That on said July 30, 1907, while plaintiff was so employed, a large amount of lumber became clogged, jammed and piled up between the skids of said "slide" and on said "push-table." That while plaintiff, in the course of his said employment, was

mounting and going upon said outside platform or "push-table" to disentangle the lumber which was so clogged, jammed and piled up on the said outside platform or "push-table," by reason of the dangerous character of the work as aforesaid, and of defendant's negligence in failing to provide for said plaintiff a reasonable safe place in which to work, by reason of defendant's negligence in failing to provide a proper and sufficient chute or "slide," by reason of said defendant's negligence in failing to provide ways and appliances for mounting and going upon said outside platform, by reason of defendant's negligence in exposing the *defendant*, being a youth as aforesaid, to the danger connected [51] with the said employment, by reason of defendant's negligence in failing to warn plaintiff of the danger connected with the said employment, and by reason of defendant's negligence in failing to instruct plaintiff in what manner he could safely perform his said duties, and by reason of plaintiff's neglect and failure to stop said rollers on said "push-table" while said lumber so piled, clogged and jammed was being released, and by reason of defendant's continuing the uninterrupted discharge of lumber upon said "push-table" while the lumber clogged, piled and jammed thereon, was so being released, plaintiff was caught by said "dog-roller," revolving in the surface of said outside platform or "push-table" and thrown down on said "push-table," and his right foot torn, bruised, wounded and mangled, by reason of which injury, plaintiff was required to and did have his right foot amputated.

7. That in consequence of the said injuries caused by the want of care and said negligence of defendant, as aforesaid, plaintiff has suffered great bodily pain and mental anguish, and has suffered the loss of his right foot, has become lame and crippled and will so remain permanently during the remainder of his natural life; that thereby his capacity for earning a livelihood has become impaired and diminished and will continue to remain so impaired and diminished, to his damage in the sum of \$25,000.

8. That in consequence of said injuries caused by said want of care and negligence of defendant, as aforesaid, plaintiff was compelled to be and remain at a hospital and sanitarium for a period of five weeks immediately following said 30th day of July, 1907, and to incur, and did incur, liability for necessary board, lodging and treatment at said hospital and sanitarium, and for surgical and medical aid and attention thereat, in the sum of \$485.00. That the reasonable value of said board, lodging, [52] treatment and surgical and medical aid and attention for which said liability was so incurred by plaintiff was and is said sum of \$485.00.

WHEREFORE, plaintiff demands judgment against defendant for the sum of \$25,485 and costs.

HUNSAKER, BRITT & FLEMING, and
HAINES & HAINES,

Attorneys for Plaintiff.

State of California,
County of San Diego,—ss.

Jesse F. McCann, being first duly sworn, deposes and says: That I am the person named in the fore-

going amendment to the second amended complaint as guardian *ad litem*; that I have read said amendment to said second amended complaint and know the contents thereof, and that the same is true of my own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters I believe it to be true.

JESSE F. McCANN.

Subscribed and sworn to before me this 26th day of June, 1909.

[Seal]

CHARLES C. HAINES,
Notary Public in and for the County of San Diego,
State of California.

[Endorsed]: At Law. Original. No. 1478. In the United States Circuit Court, Ninth Circuit, Southern District of California, Southern Division. H. C. McCann, by Jesse F. McCann, His Guardian *ad Litem*, Plaintiff, vs. Benson Lumber Company, a Corporation, Defendant. Second Amended Complaint for Damages for Personal Injuries. Received a copy of the within this 28th day of June, 1909. Gibson, Trask, Dunn & Crutcher, Attys. for Deft. Filed Jun. 28, 1909. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Haines & Haines, San Diego, Cal., and Hunsaker, Britt & Fleming, Rooms 714-719 H. W. Hellman Building, Los Angeles, California, Attorneys for Plaintiff.
[53]

In the Circuit Court of the United States, Ninth Circuit, in and for the Southern Division of the Southern District of California.

AT LAW—No. 1478.

H. C. McCANN, by JESSE F. McCANN, His Guardian *ad Litem*,

Plaintiff,

vs.

BENSON LUMBER COMPANY, a Corporation,
Defendant.

Demurrer to the Second Amended Complaint.

Now comes the defendant in the above-entitled action and demurs to the second amended complaint of plaintiff on file herein and for grounds of demurrer shows:

I.

That said second amended complaint does not state facts sufficient to constitute a cause of action.

II.

That said second amended complaint does not state facts sufficient to constitute a cause of action in this, that the same shows upon its face that the machinery and appliances therein mentioned and the dangers thereof, if any, were open and apparent; that plaintiff knew the dangers thereof, if any, as well as any person, or could have known thereof, by ordinary care, and comprehended, or could by ordinary care, have comprehended the same.

III.

That said second amended complaint is uncertain

in this, that it is impossible to ascertain therefrom in what manner or respect or how the said push-table or other appliances were defective or unsafe, or what defect there was therein, or in what manner the same were not reasonably safe or how or [54] in what manner defendant failed to use ordinary care or failed to furnish safe appliances for plaintiff, or how defendant could have guarded said appliances, or what appliances defendant should have used to guard the same or to make the same safe which it did not use.

IV.

That said amended complaint is further uncertain in this, that it is impossible to ascertain therefrom why or how plaintiff did not know of the said alleged dangers to which he was exposed, it not being alleged that the said dangers, if any at all, were concealed or of such character that a person of plaintiff's years could not have seen or understood such dangers.

V.

That said amended complaint is further uncertain in this, that it is impossible to ascertain therefrom what appliances defendant could have used or furnished to plaintiff to use in mounting the said push-table which it did not furnish.

VI.

That said amended complaint does not state facts sufficient to constitute a cause of action, in that it appears therefrom that plaintiff was not in the exercise of ordinary care.

VII.

That said amended complaint is ambiguous in the same respects and for the same reasons for which it is above shown to be uncertain.

VIII.

That said amended complaint is unintelligible in the same respects and for the same reasons for which it is above shown to be uncertain.

GIBSON, TRASK, DUNN & CRUTCHER,

Attorneys for Defendant. [55]

[Endorsed]: At Law. No. 1478. U. S. Cir. Ct., 9th Circuit, Southern Div., Southern Dist. of California. H. C. McCann, etc. vs. Benson Lumber Company. Demurrer to Second Amended Complaint. Received copy of the within demurrer this 10th day of July, 1909. Haines & Haines and Hunsaker, Britt & Fleming, Attys. for Plaintiff. Filed Jul. 10, 1909. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Gibson, Trask, Dunn & Crutcher, 718 Pacific Electric Building, Los Angeles, Cal. [56]

[Order Overruling Demurrer to Second Amended Complaint, etc.]

At a stated term, to wit, the July Term, A. D. 1909, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, Southern Division, held at the courtroom, in the City of Los Angeles, on Monday, the twelfth day of

July, in the year of our Lord one thousand nine hundred and nine. Present: The Honorable OLIN WELLBORN, District Judge.

No. 1478.

H. H. McCANN, by JESSE F. McCANN, His
Guardian *ad Litem*,

Plaintiff,

vs.

BENSON LUMBER COMPANY,

Defendant.

This cause coming on regularly on this day to be set down for trial, and it appearing that a demurrer has been interposed herein to plaintiff's second amended complaint, and W. J. Hunsaker, Esq., being present as counsel for plaintiff, and John H. Lathrop, Esq., being present as counsel for defendant, and said demurrer having been submitted to the Court for its consideration and decision upon the argument heretofore had herein on the demurrer to the amended complaint, it is now by the Court ordered, that said demurrer to the second amended complaint be, and said demurrer hereby is, overruled; it is further ordered, on motion of counsel for plaintiff and with the consent of counsel for defendant, that said cause be, and the same hereby is set down for trial on Tuesday, December 28th, 1909, at 10:30 o'clock A. M.

[Endorsed]: Filed Sep. 18, 1913. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. [57]

In the Circuit Court of the United States, Ninth Circuit, in and for the Southern Division of the Southern District of California.

AT LAW—No. 1478.

H. C. McCANN, by JESSE F. McCANN, His Guardian *ad Litem*,

Plaintiff,

vs.

BENSON LUMBER COMPANY, a Corporation,
Defendant.

Answer to Second Amended Complaint.

Now comes the said defendant in the above-entitled action and without waiving its demurrer filed herewith, and for answer to the second amended complaint on file herein:

I.

Defendant has no knowledge, information or belief sufficient to enable it to answer, as to whether or not plaintiff is a minor, of the age of nineteen years, or otherwise, and on said ground denies that plaintiff is such minor, of said age, or it a minor at all.

II.

Defendant denies that the drop from the said "push-table" to the said "carrying-table" was two feet or thereabouts, but alleges that the same was not over four feet downward and outward, so that the nearest edge of the said "carrying-table" to the nearest edge of the said "push-table" was not over

four feet downward and outward.

III.

Defendant has no knowledge, information or belief sufficient to enable it to answer as to whether or not plaintiff was, on the 30th day of July, 1907, of the age of seventeen years and three months, or thereabouts, and on said ground [58] denies that plaintiff was of said age of seventeen years and three months thereabouts, or was a minor, or was of any age under twenty-five years or thereabouts.

IV.

Defendant denies that whenever lumber might clog, jam or pile up on said chute, outside platform, or "push-table" or elsewhere, or at any time, plaintiff, either in the course of his said employment, or otherwise, was required by defendant to go upon said outside "push-table" or upon any table whatsoever, either while said rollers were in operation, or revolving, or otherwise, or at all, or while lumber was being delivered in continuous stream or otherwise from the inside of said mill or elsewhere, or at any time or at all, either to loosen or disentangle any lumber which may have become clogged or piled up, or to start the same, or to keep the same moving, or for any purpose or object whatsoever, or at all; and defendant denies that it had provided no other means for releasing, loosening or disentangling clogged or piled up lumber than for its employees or any thereof to get on or upon said "push-table" or there to accomplish such releasing, loosening or disentangling of such lumber, or otherwise; and defendant further answering admits that it had pro-

vided no means for mounting the said "push-table," and alleges that such push-table was not to be mounted by any of the defendant's servants, agents or employees, at any time while the said mill was in operation, and further alleges that if any person, servant, agent or employee of defendant should essay to mount the said push-table, although defendant did not expect, require or permit the same to be done, there were other and better and safer methods for mounting thereon than to step up or over or upon the same from the said carrying-table over the said dog-roller. [59]

V.

Defendant denies that on said 30th day of July, 1907, or at any other time, said outside platform or push-table was a dangerous or unsafe place, or a place whatsoever, on, in or with which to work, and on the contrary avers that the said push-table was not a place on which any employee or person whomsoever was required, expected or permitted to work; denies that it maintained said outside platform or push-table in a defective or unsafe condition, or that it did not exercise ordinary care in reference thereto, and denies that the said push-table was a place for plaintiff or any other employee of defendant or any person whatsoever to work, but alleges that the same was as safe as it was possible for a machine of its nature and kind to be; and denies that defendant failed to provide any safeguards which were fit or proper therefor; denies that it maintained said chute or slide in a defective or unsafe condition, or that it did not exercise ordinary care in reference thereto,

and denies that the said chute or slide rendered unsafe any place defendant had provided for plaintiff to work in, but alleges that the said slide was as safe as it was possible for an appliance of its nature and kind to be; denies that it did not have or produce, at said time or at any time, a sufficient number of skids or other device, for said chute or slide, properly to carry the lumber from said mill to said push-table, and denies that by reason of any lack of skids, or defect, or lack of proper devices, said accumulations, jams or clogs of lumber were liable to occur or said loading platform or carrying-table were rendered unsafe places at, on or about which to work; denies that said outside platform or push-table was then or there or at any time or place defective or unsafe in that [60] defendant had no reasonably safe place or means of approach thereto or for mounting or going thereon or to protect plaintiff or any person from the said dog-roller or otherwise, or at all, and in respect to said allegations of said second amended complaint defendant alleges that said push-table was not a place to be mounted, or for the doing of any work thereon, and that said dog-roller was not an appliance over or about which plaintiff or any other person whomsoever was expected, required or permitted to do any work whatsoever; and further defendant denies that there was no reasonably safe place or means of approaching or mounting the said push-table, although defendant alleges that there was no occasion or duty resting on plaintiff or any employee of defendant or any person whomsoever, to get on or work on said push-table,

at the time mentioned in said complaint, or at any time; denies that the loosening or releasing of lumber which might become clogged, piled up or jammed in any of the appliances mentioned in said complaint was required to be done when said mill was in full operation, but alleges that only such loosening and disentangling of such lumber as could be safely done, by the use of appliances furnished by defendant therefor, and without mounting upon either said push-table or said slides, was required or expected to be done without stopping the operation of said mill, and that any loosening or disentangling of such lumber which could not be so done, with such appliances so furnished by defendant, safely, and without mounting said push-table or slides, was by defendant expected, permitted and required only to be done by and after stopping the machinery of the said mill connected therewith; denies that great noise or confusion, or any confusion whatsoever, were attendant upon the full or any operation of said mill, or that the work or labor of loosening or releasing the said clogged, jammed or piled up lumber required [61] haste, either extreme, or desperate, or otherwise, or at all, or the exercise of great or violent muscular exertion or was, under such circumstances, or otherwise, of a distracting character, either extremely, or at all; denies that said work was, in any respect, unsuitable in character, or under the circumstances under which it was performed, or otherwise, for anyone, whether minor or adult, or for the plaintiff; denies that at said time, or at any time, defendant failed to use ordinary or any care to

provide a safe way or safe appliances for the use of plaintiff in mounting or going upon said outside platform or push-table, or that it failed to use ordinary care in any respect or in connection with any of the matters or things mentioned in said complaint, and denies that plaintiff was expected, permitted or required by defendant or any of its servants, agents or employees, to mount or go upon said push-table; denies that defendant had provided no safe way or safe appliance that could have been used in mounting said push-table, but inasmuch as said push-table was not a place where work was to be done, or which it was expected would be mounted, defendant denies that any duty rested on it to provide any means, way or appliances for the use of plaintiff or any person, to mount or go upon the same; denies that plaintiff had no experience of or did not know of the perils or dangers, if any there were, in doing the work for which he was employed or in which he was engaged; denies that defendant failed to warn said plaintiff of the dangers and perils to him incident to his said employment and work; denies that said plaintiff was either youthful or inexperienced, or that, with knowledge of any youth or inexperience of plaintiff or of any circumstances whatsoever, or otherwise, defendant [62] required plaintiff to expose himself to any perils or dangers whatsoever, either carelessly, negligently, or recklessly, or otherwise, or at all; denies that at said time or at any time whatsoever, the said outside platform or "push-table" was a place for plaintiff to work in, or in which he was expected, per-

mitted or required by defendant to work, whether unsafe as stated in said complaint or otherwise or at all, and denies that defendant knew or had means of knowing of the said push-table as a place, unsafe or otherwise, for plaintiff to work in; denies that said chute or slide, or anything whatsoever, rendered said outside platform an unsafe place in which to work, and denies that the said outside platform was a place at all in which work was permitted, required or expected by defendant to be done; denies that the discharge or stream of lumber from said mill rendered any work therein perilous or unsafe, and denies that plaintiff, either by reason of youth or inexperience or the character of his work, or otherwise, or at all, was exposed or liable to injury, peculiarly, especially, or otherwise, or at all, in the performing of his said work.

VI.

Defendant denies that on the said day mentioned in said complaint, or at any time, a large amount of lumber became clogged, jammed or piled up between said skids or elsewhere, as therein alleged; admits, however, that one or two pieces of lumber did become clogged between said skids; denies that plaintiff mounted or went upon said outside platform or push-table, at said time, or at any time, in the course of his said employment, either to disentangle any purpose whatsoever; and denies that [63] any lumber had then or there or elsewhere or at any time become tangled or jammed by reason of any dangerous character of any work in said mill; denies that any of the work in said mill was of a

dangerous character, or that plaintiff was not provided with a reasonably safe place in which to work, or that a proper or sufficient chute or slide was not provided, or that all proper ways and appliances were not provided, or that plaintiff, as a youth or otherwise, was exposed to any dangers by defendant, or that defendant failed to warn plaintiff of the dangers connected with said employment, if any, or that defendant failed to instruct plaintiff in what manner he could safely perform his said duties, or that defendant was negligent in either or any of the matters or things in said second amended complaint contained or specified, or otherwise; denies that by reason of any act or acts, fault, carelessness, omission or negligence of defendant or any of its servants, agents or employees, except said plaintiff, said plaintiff sustained any injury whatsoever; denies that any injuries which plaintiff may have received were caused by said rollers on said push-table not being stopped at any time or by reason of defendant's continuing the operation of said mill; and specially denies that plaintiff sustained injuries or damage in the sum of \$25,000 or in any other sum or amount whatsoever; and defendant avers that plaintiff was fully informed and instructed as to his said work and the dangers if any that might pertain thereto; and defendant avers further that there were no dangers in said work if the same was properly done in the manner in which plaintiff was instructed and directed to do same, and that there was not and would not have been any piling or jamming or entangling or lumber in said work if the same was

properly done in the manner in which plaintiff was directed and instructed to do the same.

VII.

Defendant has no knowledge, information or belief sufficient [64] to enable it to answer, as to whether plaintiff received any or either of the injuries mentioned in said complaint or suffered bodily pain, mental anguish or the loss of his right foot, or any disability whatever, or as to the permanency or possible duration thereof, or as to whether his capacity to earn a livelihood has become impaired or diminished or will so continue; and on said ground denies that plaintiff sustained any injuries, whatsoever, or suffered any bodily pain or mental anguish, or loss of any foot, or any disability whatsoever, or that any disability of plaintiff will be permanent or will diminish or impair or has diminished or impaired any capacity of plaintiff whatsoever; and specially defendant denies that plaintiff has been damaged, in the sum of twenty-five thousand dollars, or in any other sum or amount whatsoever.

VIII.

Defendant has no knowledge, information or belief sufficient to enable it to answer, as to any of the allegations contained in paragraph 8 of said second amended complaint, and basing its answer on said ground, denies each and every of the allegations in said paragraph contained, generally and specifically; and specially denies that plaintiff was compelled to incur or did incur liability in the sum of \$485, or any other sum or amount whatsoever, whether for board,

lodging, or treatment at any hospital or sanitarium, or surgical or medical aid or attention thereat, or elsewhere, or otherwise, or at all, and specially defendant denies that the reasonable or any value of such board, lodging, treatment, or surgical or medical aid or attention, or all or any thereof, was said sum of \$485, or any other sum or amount whatsoever; and specially defendant denies that plaintiff has been damaged in the sum of \$485, or in any other sum or amount whatsoever. [65]

IX.

For further, separate and distinct answer, said defendant alleges that the said plaintiff himself did not exercise ordinary care or caution to avoid being injured, and that the injuries, if any, sustained by the said plaintiff, as alleged in said complaint, or otherwise, were directly and proximately contributed to and caused by the fault, carelessness and negligence of the said plaintiff and the failure of said plaintiff to exercise ordinary care for his own protection as aforesaid.

X.

For further, separate and distinct answer, said defendant alleges that the injuries sustained by the said plaintiff, if any, were a risk incident to the business in which he was employed, and that prior to receiving such injuries the said plaintiff knew, or by the exercise of ordinary care upon his part, should have known, of the danger incident to working in the position in which he was; and that the said plaintiff then and there assumed the risk of being injured as he was, if he was so injured, in and

about the said work, and that the injuries of the said plaintiff were a risk assumed by him the said plaintiff as incident to his said employment.

XI.

For further, separate and distinct answer, said defendant alleges that the injuries sustained by the said plaintiff, if any, were a risk incident to the business in which he was employed, and that prior to receiving such injuries the said plaintiff knew, or by the exercise of ordinary care upon his part, should have known, of the danger incident to working in the position in which he was; and that said plaintiff fully understood, comprehended and appreciated, prior to receiving such injuries, the dangers incident to [66] the use of the machinery, ways, appliances and structures mentioned in said complaint, and thereafter consented to use the same and continued in the use thereof.

XII.

For further separate and distinct answer, said defendant alleges that if the injuries, if any, of the said plaintiff were caused wholly or in part by the negligence of any other person or persons than the said plaintiff, such other person or persons were at the time coemployees of said plaintiff, engaged in the same general business, and in the same department of business in which he said plaintiff was engaged at the time of said accident, and were not superiors in rank to the said plaintiff nor had they the power of employing or discharging men, and defendant alleges that it exercised and used ordinary care in the selection and retention of all employees

engaged in the same general business in which said plaintiff was engaged at the time of said accident.

Wherefore, defendant prays judgment, for its costs.

GIBSON, TRASK, DUNN & CRUTCHER,

Attorneys for Defendant.

[Endorsed]: At law. No. 1478. U. S. Cir. Ct., 9th Circuit, Southern Div., Southern Dist. of California. H. C. McCann, etc., vs. Benson Lumber Co. Answer to the Second Amended Complaint. Received copy of the within answer this 10th day of July, 1909. Haines & Haines, Hunsaker, Britt & Fleming, Attys. for Plaintiff. Filed Jul. 10, 1909. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Gibson, Trask, Dunn & Crutcher, 718 Pacific Electric Building, Los Angeles, Cal. [67]

In the Circuit Court of the United States, Ninth Circuit, in and for the Southern Division of the Southern District of California.

AT LAW—No. 1478.

H. C. McCANN, by JESSE F. McCANN, His Guardian *ad Litem*,

Plaintiff,

vs.

BENSON LUMBER COMPANY, a Corporation,
Defendant.

Amended Answer to Second Amended Complaint.

Now comes the said defendant in the above-entitled action, pursuant to stipulation filed herein, and

without waiving its demurrer filed with its answer in this cause, and in lieu of the said unverified answer hereinbefore filed, for amended answer to the second amended complaint on file herein:

I.

Defendant has no knowledge, information or belief, sufficient to enable it to answer, as to whether or not plaintiff is a minor, of the age of nineteen years, or otherwise, and on said ground denies that plaintiff is such minor, of said age, or is a minor at all.

II.

Defendant denies that the drop from the said "push-table" to the said "carrying-table" was two feet or thereabouts, but alleges that same was not over four feet downward and outward so that the nearest edge of the said "carrying-table" to the nearest edge of the said "push-table" was not over four feet downward and outward.

III.

Defendant has no knowledge, information or belief sufficient [68] to enable it to answer, as to whether or not plaintiff was, on the 30th day of July, 1907, of the age of seventeen years and three months, or thereabouts, and on said ground denies that plaintiff was of said age of seventeen years and three months or thereabouts, or was a minor, or was of any age under twenty-five years or thereabouts.

IV.

Defendant denies that whenever lumber might clog, jam or pile up on said chute, outside platform, or "push-table," or elsewhere, or at any time, plain-

tiff, either in the course of his said employment or otherwise, was required by defendant to go upon said outside "push-table" or upon any table whatsoever, either while said rollers were in operation, or revolving, or otherwise, or at all, or while lumber was being delivered in continuous streams or otherwise, from the inside of said mill or elsewhere, or at any time, or at all, either to loosen or disentangle any lumber which may have become clogged or piled up, or to start the same, or to keep the same moving or for any purpose or object whatsoever, or at all; and defendant denies that it had provided no other means for releasing, loosening or disentangling clogged or piled up lumber than for its employees or any thereof to get on or upon said "push-table" or there to accomplish such releasing, loosening or disentangling of such lumber, or otherwise; and defendant further answering admits that it had provided no means for mounting on said "push-table," and alleges that such push-table was not to be mounted by any of the defendants' servants, agents or employees, at any time, while said mill was in operation, and further alleges that if any person, servant, agent or employee of defendant should essay to mount the said push-table, although defendant did not expect, require or permit the same to be done, there were other and better and safer methods for mounting [69] thereon than to step up or over or upon the same from the said carrying-table, over the said dog roller.

V.

Defendant denies that on said 30th day of July,

1907, or at any other time, said outside platform or push-table was a dangerous or unsafe place, or a place whatsoever, on, in or with which to work, and on the contrary avers that the said push-table was not a place on which any employee or person whomsoever was required, expected or permitted to work; denies that it maintained said outside platform or push-table in a defective or unsafe condition, or that it did not exercise ordinary care in reference thereto, and denies that the said push-table was a place for plaintiff or any other employee of defendant or any person whatsoever to work, but alleges that the same was as safe as it was possible for a machine of its nature and kind to be; and denies that defendant failed to provide any safeguards which were fit or proper therefor; denies that it maintained said chute or slide in a defective or unsafe condition, or that it did not exercise ordinary care in reference thereto, and denies that the said chute or slide rendered unsafe any place defendant had provided for plaintiff to work in, but alleges that the said slide was as safe as it was possible for an appliance of its nature and kind to be; denies that it did not have or provide, at said time or at any time, a sufficient number of skids or other device, for said chute or slide, properly to carry the lumber from said mill to said push-table, and denies that by reason of any lack of skids, or defect, or lack of proper devices, said accumulations, jams or clogs of lumber were liable to occur or said loading platform or carrying-table were rendered unsafe places at, on or about which to work; denies that said outside plat-

form or push-table was then or there [70] or at any time or place defective or unsafe in that defendant had no reasonably safe place or means of approach thereto or for mounting or going thereon or to protect plaintiff or any person from the said dog-roller, or otherwise, or at all, and in respect to said allegations of said second amended complaint defendant alleges that said push-table was not a place to be mounted, or for the doing of any work thereon, and that said dog-roller was not an appliance over or about which plaintiff or any other person whomsoever was expected, required or permitted to do any work whatsoever; and further defendant denies that there was no reasonably safe place or means of approaching or mounting the said push table, although defendant alleges that there was no occasion or duty resting on plaintiff or any employee of defendant or any person whomsoever to get on or work on said push-table, at the time mentioned in said complaint, or at any time; denies that the loosening or releasing of lumber which might become clogged, piled up or jammed in any of the appliances mentioned in said complaint, was required to be done when said mill was in full operation, but alleges that only such loosening and disentangling of such lumber as could be safely done, by the use of appliances furnished by defendant therefor, and without mounting upon either said push-table or said slides, was required or expected to be done without stopping the operation of said mill, and that any loosening or disentangling of such lumber which could not be so done, with such appliances so fur-

nished by defendant, safely, and without mounting said push-table or slides, was by defendant expected, permitted and required only to be done by and after stopping the machinery of the said mill connected therewith; denies that great noise or confusion, or any confusion whatsoever, were attendant upon the full or any operation of said mill, or that the work or labor [71] of loosening or releasing the said clogged, jammed or piled up lumber required haste, either extreme, or desperate, or otherwise, or at all, or the exercise of great or violent muscular exertion, or was, under such circumstances, or otherwise, of a distracting character, either extremely, or at all; denies that said work was, in any respect, unsuitable in character, or under the circumstances under which it was performed, or otherwise, for anyone, whether minor or adult, or for the plaintiff; denies that at said time, or at any time, defendant failed to use ordinary or any care to provide a safe way or safe appliances for the use of plaintiff in mounting or going upon said outside platform or push-table, or that it failed to use ordinary care in any respect or in connection with any of the matters or things mentioned in said complaint, and denies that plaintiff was expected, permitted, or required by defendant or any of its servants, agents or employees, to mount or go upon said push-table; denies that defendant had provided no safe way or safe appliances that could have been used in mounting said push-table, but inasmuch as said push-table was not a place where work was to be done, or which it was expected would be mounted, defendant denies that any duty rested

on it to provide any means, way or appliances for the use of plaintiff or any person, to mount or go upon the same; denies that plaintiff had no experience of or did not know of the perils or dangers, if any there were, in doing the work for which he was employed or in which he was engaged; denies that defendant failed to warn said plaintiff of the dangers and perils to him incident to his said employment and work; denies that said plaintiff was either youthful or inexperienced, or that, with knowledge of any youth or inexperience of plaintiff or [72] of any circumstances whatsoever or otherwise, defendant required plaintiff to expose himself to any perils or dangers whatsoever, either carelessly, negligently, or recklessly, or otherwise, or at all; denies that at said time or at any time whatsoever, the said outside platform or "push-table" was a place for plaintiff to work in, or in which he was expected, permitted or required by defendant to work, whether unsafe as stated in said complaint or otherwise or at all, and denies that defendant knew or had means of knowing of the said push-table as a place, unsafe or otherwise, for plaintiff to work in; denies that said chute or slide, or anything whatsoever, rendered said outside platform an unsafe place in which to work, and denies that the said outside platform was a place at all in which work was permitted, required or expected by defendant to be done; denies that the discharge or stream of lumber from said mill rendered any work therein perilous or unsafe, and denies that plaintiff, either by reason of youth or inexperience or the character of his work, or otherwise, or at all,

was exposed or liable to injury, peculiarly especially, or otherwise, or at all, in the performing of his said work.

VI.

Defendant denies that on the said day mentioned in said complaint, or at any time, a large amount of lumber became clogged, jammed or piled up between said skids or elsewhere, as therein alleged; admits, however, that one or two pieces of lumber did become clogged between said skids; denies that plaintiff mounted or went upon said outside platform or push-table at said time or at any time in the course of his said employment, either to disentangle any lumber, or for any purpose whatsoever; and denies that any lumber had then or there or elsewhere or at any time become tangled or jammed by reason of any dangerous character of any work in said mill; [73] denies that any of the work in said mill was of a dangerous character, or that plaintiff was not provided with a reasonably safe place in which to work, or that a proper or sufficient chute or slide was not provided, or that all proper ways and appliances were not provided, or that plaintiff, as a youth or otherwise, was exposed to any dangers by defendant or that defendant failed to warn plaintiff of the dangers connected with said employment, if any, or that defendant failed to instruct plaintiff in what manner he could safely perform his said duties, or that defendant was negligent in either or any of the matters or things in said second amended complaint contained or specified, or otherwise; denies that by reason of any act or acts, fault, carelessness, omis-

sion or negligence of defendant or any of its servants, agents, or employees, except said plaintiff, said plaintiff sustained any injury whatsoever; denies that any injuries which plaintiff may have received were caused by said rollers on said push-table not being stopped at any time or by reason of defendant's continuing the operation of said mill; and specially denies that plaintiff sustained injuries or damage in the sum of \$25,000 or in any other sum or amount whatsoever; and defendant avers that plaintiff was fully informed and instructed as to his said work and the dangers if any that might pertain thereto; and defendant avers further that there were no dangers in said work if the same was properly done in the manner in which plaintiff was instructed and directed to do same, and that there was not and would not have been any piling or jamming or entangling of lumber in said work if the same was properly done in the manner in which plaintiff was directed and instructed to do the same. And defendant further alleges that it had instructed said plaintiff not to go on or upon the said push-table and had not only [74] warned and instructed him not to go on said push-table, but had ordered him not to go on said push-table; that there was no necessity of plaintiff's getting on said push-table; and defendant further alleges that there was at no time any jamming or piling of logs or lumber, nor could there be any jamming or piling of logs or lumber, greater than the fact that one or two boards might get caught going over said push-table, and plaintiff had the means of loosening the said boards and lumber,

or whatever might get caught, without going on said push-table; and defendant further alleges that in the event plaintiff went upon the said push-table that there were means and ways of going upon the same with safety to himself, and without passing over the said dog-roller in which his foot was caught; and defendant further alleges that plaintiff voluntarily and contrary to the orders and directions of defendant went upon the said push-table, and chose the most dangerous and hazardous means possible of going on the said push-table.

VII.

Defendant has no knowledge, information or belief sufficient to enable it to answer, as to whether plaintiff received any or either of the injuries mentioned in said complaint or suffered bodily pain, mental anguish or the loss of his right foot, or any disability whatever, or as to the permanency or possible duration thereof, or as to whether his capacity to earn a livelihood has become impaired or diminished or will so continue; and on said ground, denies that plaintiff sustained any injuries whatsoever, or suffered any bodily pain or mental anguish or loss of any foot, or any disability whatsoever, or that any disability of plaintiff will be permanent or will diminish or impair or has diminished or impaired any capacity of plaintiff whatsoever; and specially [75] defendant denies that plaintiff has been damaged, in the sum of twenty-five thousand dollars, or in any other sum or amount whatsoever.

VIII.

Defendant has no knowledge, information or be-

lief sufficient to enable it to answer, as to any of the allegations contained in paragraph 8 of said second amended complaint, and basing its answer on said ground, denies each and every of the allegations in said paragraph contained, generally and specifically; and specially denies that plaintiff was compelled to incur or did incur liability in the sum of \$485 or any other sum or amount whatsoever, whether for board, lodging or treatment at any hospital or sanitarium, or surgical or medical aid or attention thereat, or elsewhere, or otherwise, or at all, and specially defendant denies that the reasonable or any value of such board, lodging, treatment, or surgical or medical aid or attention, or all or any thereof, was said sum of \$485 or any other sum or amount whatsoever; and specially defendant denies that plaintiff has been damaged in the sum of \$485 or in any other sum or amount whatsoever.

IX.

For further, separate and distinct answer, said defendant alleges that the said plaintiff himself did not exercise ordinary care or caution to avoid being injured, and that the injuries, if any, sustained by the said plaintiff, as alleged in the said complaint, or otherwise, were directly and proximately contributed to and caused by the fault, carelessness and negligence of the said plaintiff and the failure of said plaintiff to exercise ordinary care for his own protection as aforesaid. [76]

X.

For further, separate and distinct answer, said defendant alleges that the injuries sustained by the

said plaintiff, if any, were a risk incident to the business in which he was employed, and that prior to receiving such injuries the said plaintiff knew, or by the exercise of ordinary care upon his part, should have known, of the danger incident to working in the position in which he was; and that the said plaintiff then and there assumed the risk of being injured as he was, if he was so injured, in and about the said work, and that the injuries of the said plaintiff were a risk assumed by him the said plaintiff as incident to his said employment.

XI.

For further, separate and distinct answer, said defendant alleges that the injuries sustained by the said plaintiff, if any, were a risk incident to the business in which he was employed, and that prior to receiving such injuries the said plaintiff knew, or by the exercise of ordinary care upon his part, should have known, of the danger incident to working in the position in which he was; and that said plaintiff fully understood, comprehended and appreciated prior to receiving such injuries, the dangers incident to the use of the machinery, ways, appliances and structures mentioned in said complaint, and thereafter consented to use the same and continued in the use thereof.

XII.

For further, separate and distinct answer, said defendant alleges that if the injuries, if any, of the said plaintiff were caused wholly or in part by the negligence of any other person or persons than the said plaintiff, such other person or persons were at

the time coemployees of said plaintiff, engaged in the same general business, and in the same department of business in which he said plaintiff was engaged [77] at the time of said accident, and were not superiors in rank to the said plaintiff nor had they the power of employing or discharging men, and defendant alleges that it exercised and used ordinary care in the selection and retention of all employees engaged in the same general business in which said plaintiff was engaged at the time of said accident.

WHEREFORE, defendant prays judgment for its costs.

GIBSON, TRASK, DUNN & CRUTCHER,
Attorneys for Defendant.

State of California,
County of San Diego.

O. J. Evenson, being first duly sworn, deposes and says: That he is an officer and agent of the defendant in the above-entitled action, to wit, vice-president and manager, and as such is better informed concerning the facts of the above-entitled action and the facts pertaining to the defense of the above-entitled action, than any other agent or officer of the said defendant, and that for that reason affiant makes a verification of this amended answer.

Affiant further says that he has read the foregoing amended answer and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

O. J. EVENSON.

Subscribed and sworn to before me this July 24, 1909.

[Seal]

E. V. WINNEK,

Notary Public, Within and for the County of San Diego, State of California. [78]

[Endorsed]: No. 1478. U. S. Circuit Court, Ninth Circuit, Southern District of California. H. C. McCann, etc., Plaintiff, vs. Benson Lumber Co., Defendant. Amended Answer. Filed Jul. 28, 1909. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Received copy of the within answer this 28th day of July, 1909. Haines & Haines, Hunsaker, Britt & Fleming for Plaintiff. Gibson, Trask, Dunn & Crutcher, Los Angeles, Cal., Attys. for Deft. [79]

In the Circuit Court of the United States, Ninth Circuit, in and for the Southern Division of the Southern District of California.

AT LAW—No. 1478.

H. C. McCANN, by JESSE F. McCANN, His Guardian *ad Litem*,

Plaintiff,

vs.

BENSON LUMBER COMPANY, a Corporation,
Defendant.

**Amendment to Defendant's Amended Answer to
Second Amended Complaint.**

Comes now the defendant in the above-entitled cause and by leave of Court first had and obtained amends its amended answer as follows:

On page 2, paragraph 4, line 24, after the words "or otherwise," strike out all of the remainder of said paragraph 4, including lines 1 and 2 on page 3 of the amended answer, and insert in lieu thereof the following denials and allegations:

"Defendant denies that it had not provided any means for mounting upon said push-table, and alleges that there were other, better and safer means and methods for mounting said push-table than at the place and in the manner in which said plaintiff at the time the injuries alleged to have been received by him, attempted to mount said push-table from the carrying-table and over said dog-roller; and defendant further alleges that lumber buggies were kept constantly alongside said push-table and that it was the custom of the employees whenever it became necessary to mount said push-table to mount the same from said lumber buggies, which was a safe, easy and convenient means of mounting said push-table."

WRIGHT & WINNEK,

Attorneys for Defendant. [80]

State of California,

County of San Diego,—ss.

J. Campbell Black, being duly sworn, deposes and says: That he is the manager of Benson Lumber Company, defendant in the above-entitled action; that he has heard read the foregoing amendment to defendant's amended answer, and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information and belief, and as

to those matters that he believes it to be true. That he makes this verification for and on behalf of said defendant corporation and is duly authorized to make such verification.

J. CAMPBELL BLACK.

Subscribed and sworn to before me, this 12 day of Sept., 1913.

[Seal]

E. V. WINNEK,

Notary Public in and for the County of San Diego,
State of California.

[Endorsed]: C. C. No. 1478. At Law. In the District Court of the United States, Southern District of California, Southern Division. H. C. McCann, by Jesse F. McCann, His Guardian *ad Litem*, Plaintiff, vs. Benson Lumber Company, a Corporation, Defendant. Amendment to Defendant's Amended Answer to Second Amended Complaint. Filed September 12, 1913. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. Wright & Winnek, 817-820 Timken Building, S. E. Corner Sixth and E. Streets, Attorneys for Defendant. [81]

[Verdict.]

*In the District Court of the United States, for the
Southern District of California, Southern Divi-
sion.*

C. C. No. 1478.

H. C. McCANN, by JESSE F. McCANN, His Guard-
ian *ad Litem*,

Plaintiff,

vs.

BENSON LUMBER COMPANY, a Corporation,
Defendant.

We, the jury in the above-entitled cause, find in
favor of the plaintiff, in the sum of \$8,000.

San Diego, Cal., Sept. 16th, 1913.

GILBERT C. ARNOLD,

Foreman.

[Endorsed]: C. C. 1478. U. S. District Court,
Southern Dist. of Calif., Southern Division. *J. H.*
McCann, etc., vs. Benson Lumber Co. Verdict.
Filed September 16, 1913. Wm. M. Van Dyke,
Clerk. By C. E. Scott, Deputy Clerk. [82]

[Judgment.]

UNITED STATES OF AMERICA.

District Court of the United States, Southern District of California, Southern Division.

C. C. No. 1478.

H. C. McCANN, by JESSE F. McCANN, His Guardian *ad Litem*,

Plaintiff,

vs.

BENSON LUMBER COMPANY, a Corporation,
Defendant.

This cause having come on regularly for trial on the 12th day of September, 1913, being a day in the September Term, A. D. 1913, of the District Court of the United States for the Southern District of California, Southern Division, before the Court and a jury of twelve (12) men duly impanelled; A. Haines, Esq., appearing as counsel for plaintiff, and Leroy A. Wright, Esq., and A. V. Winnek, Esq., appearing as counsel for defendant, and the trial having been proceeded with on the 12th, 13th, 15th, and 16th days of September, 1913, and witnesses having been sworn and examined, and the evidence having been closed, and the cause, after argument by counsel for the respective parties and the instructions of the Court, having been on said 16th day of September, 1913, submitted to the jury, and the jury thereafter on said 16th day of September, 1913, having rendered the following verdict:

“In the District Court of the United States, for the Southern District of California, Southern Division.

C. C. No. 1478.

H. C. McCANN, by JESSE F. McCANN, His Guardian *ad Litem*,

Plaintiff,

vs.

BENSON LUMBER COMPANY, a Corporation,
Defendant.

We, the jury in the above-entitled cause, find in favor of the plaintiff, in the sum of \$8,000.

San Diego, Cal., Sept. 16th, 1913.

GILBERT C. ARNOLD,

Foreman.” [83]

and the Court having ordered that judgment be entered herein, in accordance with said verdict in favor of the plaintiff and against the defendant in the sum of Eight Thousand Dollars (\$8,000.00);

Now, therefore, by virtue of the law, and by reason of the premises aforesaid, it is considered by the Court that H. C. McCann, by Jesse F. McCann, his guardian *ad litem*, plaintiff herein, have and recover of and from the Benson Lumber Company, a corporation, defendant herein, the sum of Eight Thousand Dollars (\$8,000.00), together with the costs and disbursements of said plaintiff in this behalf taxed at \$88.25/100.

Judgment entered September 18, 1913.

WM. M. VAN DYKE,
Clerk.

By C. E. Scott,
Deputy Clerk.

[Endorsed]: C. C. No. 1478. United States District Court, Southern District of California, Southern Division. H. C. McCann, by Jesse F. McCann, His Guardian *ad Litem*, Plaintiff, vs. Benson Lumber Company, a Corporation, Defendant. Copy of Judgment. Filed Sep. 18, 1913. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. [84]

[Certificate of Clerk to Judgment and Judgment-roll.]

In the District Court of the United States, for the Southern District of California, Southern Division.

C. C. No. 1478.

H. C. McCANN, by JESSE F. McCANN, His Guardian *ad Litem*,

Plaintiff,

vs.

BENSON LUMBER COMPANY, a Corporation,
Defendant.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States for the Southern District of California, do hereby certify the foregoing to be a true copy of the Judgment entered in the above-entitled action, and recorded in Judgment Book No.

2 of said Court for the Southern Division, at page 219 thereof, and I further certify that the foregoing papers hereto annexed constitute the judgment-roll in said action.

Attest my hand and the seal of said District Court this 18th day of September, A. D. 1913.

WM. M. VAN DYKE,

Clerk.

By C. E. Scott,

Deputy Clerk.

[Endorsed]: C. C. No. 1478. In the District Court of the United States for the Southern District of California, Southern Division. H. C. McCann, by Jesse F. McCann, His Guardian *ad Litem*, Plaintiff' vs. Benson Lumber Co., Defendant. Judgment-roll. Filed September 18, 1913. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. Recorded Judgment Register, Book No. 2, page 219. [85]

In the District Court of the United States for the Southern District of California, Southern Division.

H. C. McCANN, by JESSE F. McCANN, His Guardian *ad Litem*,

Plaintiff,

vs.

BENSON LUMBER COMPANY, a Corporation,
Defendant.

Stipulation [as to Exhibit III—Model of Portion of Mill].

IT IS HEREBY STIPULATED that the model of a portion of the mill where plaintiff was hurt, which was used in evidence by both sides, for the purpose of illustration, may be considered as attached to the original Bill of Exceptions, as Exhibit No. III, without being physically attached thereto, and that if the defendant sues out and obtains a Writ of Error in the above-entitled action, that the Clerk of the said District Court of the United States for the Southern District of California, Southern Division, may attach the said model to the original printed transcript of the record and cause the said model to be filed with the said original transcript of record in the United States Circuit Court of Appeals for the Ninth Circuit.

HAINES & HAINES,
Attorneys for Plaintiff.

GIBSON, DUNN & CRUTCHER,
WRIGHT & WINNEK,
Attorneys for Defendant.

[Endorsed]: C. C. 1478. In the District Court of the United States, for the Southern District of California, Southern Division. H. C. McCann, by Jesse F. McCann, His Guardian *ad Litem*, Plaintiff, [86] vs. Benson Lumber Company, a Corporation, Defendant. Stipulation. Filed Nov. 20, 1913. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Gibson, Dunn & Crutcher, Attorneys for Defendant. [87]

ORIGINAL.

*In the District Court of the United States for the
Southern District of California, Southern Di-
vision.*

C. C. #1478.

H. C. McCANN, by JESSE F. McCANN, His
Guardian *ad Litem*,

Plaintiff,

vs.

BENSON LUMBER COMPANY, a Corporation,
Defendant.

Bill of Exceptions.

Received copy of the within Bill of Exceptions
this 19 day of November, 1913, the same being
served within the time allowed by law and as ex-
tended by stipulations of the parties hereto and by
the order of Court duly made.

HUNSAKER & BRITT,
HAINES & HAINES,

Attorneys for Plaintiff.

GIBSON, DUNN & CRUTCHER,

Attorneys for Defendant.

Filed Nov. 20, 1913. Wm. M. Van Dyke, Clerk.
By R. S. Zimmerman, Deputy Clerk.

Settled and filed January 5, 1914. Wm. M. Van
Dyke, Clerk. By C. E. Scott, Deputy Clerk. [88]

ORIGINAL.

*In the District Court of the United States, for the
Southern District of California, Southern Di-
vision.*

H. C. McCANN, by JESSE F. McCANN, His
Guardian *ad Litem*,

Plaintiff,

vs.

BENSON LUMBER COMPANY, a Corporation,
Defendant.

Bill of Exceptions.

BE IT REMEMBERED that the above-entitled action came on regularly for trial on the 12th day of September, 1913, in the above-entitled court before the Honorable Olin Wellborn, Judge; plaintiff appeared by Haines & Haines, his attorneys, and the defendant by Leroy A. Wright, one of its attorneys, and a jury of twelve persons were duly impaneled and sworn to try said cause, and thereupon the following proceedings, and none other, were had: [89]

Testimony of Mrs. Ida L. McCann [for Plaintiff].

Mrs. IDA L. McCANN, called, sworn and examined as a witness on behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. HAINES.)

My name is Mrs. Ida L. McCann. I am the mother of the plaintiff, H. C. McCann. He was born April 15th, 1890. At the time of this accident he

(Testimony of Mrs. Ida L. McCann.)

was seventeen years and a little over, old—two months, I think it was, from April 15th to July 30th. I saw him after this accident occurred just as soon as I could get to the hospital, to the sanitarium.
[90]

Testimony of H. C. McCann [in His Own Behalf].

H. C. McCANN, called, sworn and examined in his own behalf, testified as follows:

Direct Examination.

(By Mr. HAINES.)

Mr. HAINES.—I will ask the plaintiff to be sworn, with this explanation, that I only wish to examine him with respect to the *locus in quo*. We have his deposition which I want to avail myself of the statutory right to read.

My name is H. C. McCann. I am the plaintiff in the action. Since the accident I have given attention to studying the locality, the place, the premises where it occurred. I made this sketch of the premises which you show me within a few days. It is my work, and whatever measurements there are thereon, I made them. This paper, which is marked Plaintiff's Exhibit 1, relates right to the time of the accident, as it was at that time. I have used the scale of a quarter of an inch to a foot in making the drawing. I have studied this sort of drawing in correspondence, and it represents correctly what it purports to represent as to the measurements at the time of the accident.

Q. What does this upper half of this plat represent?

(Testimony of H. C. McCann.)

Mr. WRIGHT.—Just one more objection. I do not understand that this drawing purports to have been made at the time of the accident or shortly thereafter. It has been made within a few days. I would like to have witness qualify himself so that he shows he knows that it represents the plant as it was then.

Mr. HAINES.—That is what I asked him, you may cross-examine.

(By Mr. WRIGHT.)

Q. How do you know that this drawing represents the mill as it was at the time of the accident?

A. After the accident, right directly after that I studied this machine so that in making a few measurements [91] I know right where it stood.

Q. There have been some changes, have there not, in the push-table and carrying-table, and also in the trimmer?

A. No, sir, not *in* all. I do not know what the measurements were at the time of the accident. I made measurements of the push-table before the changes were made.

Q. Do you know what changes have been made?

A. Yes, sir.

Q. What changes have been made?

A. The changes that have been made were in the push-table.

Q. And what have been those changes?

A. It has been lowered a foot and moved out from the mill three feet. This drawing which I made represents the mill as it was before any change was

(Testimony of H. C. McCann.)

made. I made accurate measurements of all the details that are represented in this drawing. As near as I can remember, it has been a short time after the accident I took this course in drawing and have been studying. I have been studying ever since, about five years or thereabouts.

By Mr. WRIGHT.—I will withdraw any objection.

By Mr. HAINES.—In making those changes they have changed the whole situation right directly around the push-table. A board that was on the end of the table by the dog-roller was removed.

(It was here stipulated between counsel that a model of the push-table, carrying-table and platform as at the time of the accident should be used during the trial as an approximately correct representation thereof, subject to any change that might appear by the evidence or as corrected by oral testimony, and that each part of the model be lettered, the same lettering to be used as that used in the picture and photograph attached to plaintiff's deposition.)

(Witness continuing:) This board right on the end here by the roller, this board right here, that little piece in between there which I mark "X" was removed. The push-table [92] was lowered. This is the push-table marked "A." The carrier's table is marked "B," to correspond with the photograph. This is the loading platform, the platform we worked from. I mark it "F." The push-table was lowered one foot and moved out from the mill three feet. The lengthwise direction of the push-

(Testimony of H. C. McCann.)

table was 17 feet, 11 inches. It ran north and south, that is the measurement. This is shown on the diagram I have made here as Exhibit 1. The trimmer "D," as marked on the diagram was on the west side of the push-table. The carrier-table marked "B" is shown on my plat, and the loading platform "F" also. The place where the trimmer was is represented on this plat by "E." The trimmer consisted of a table about around the neighborhood of 30 feet long. The north end of the trimmer was directly west of the north end of the push-table. The south end of the trimmer was directly west about 8 feet from the south end of the carrier-table "B." The length of the trimmer was about 8 feet from the south end of the carrier-table to the end of the push-table. The trimmer is around the neighborhood of 12 feet wide. It had an incline sloping downward as it went in the mill, that is, it sloped westward. The upper edge of the trimmer, with respect to the east wall of the mill, ended directly at the east wall of the mill, and inclined then from the wall of the mill into the mill and downward, so that the wall of the mill made a sort of ridge as it were, of a roof, a ridge pole. This model represents the position of the mill as it is now in regard to the points of the compass. I will tell you what I know of the way the mill operated from the time the log was dragged from the bay onto the big log-carrier until the lumber was delivered over [93] this trimmer. The log was put on the main carriage that is up on the mill, to saw all the lumber. It carried it back and forth past

(Testimony of H. C. McCann.)

a band saw. As it sawed off each slab or boards, which ever happened to come first, it was dragged down on to a carrier. That mechanism is not represented here at all, it is away up in the fore part of the mill. I am demonstrating from the south end, which was at the bay where the logs come up from the bay. The mill was on the west side of all that is represented here. These posts here are the mill posts of the east wall, and the mill itself is on the west side of what would be this model. That was the mill for sawing these logs into lumber. Each time this carriage would come past the band saw, it would saw off a board. The carriage would move rapidly or slowly, it was under the control of the sawyer. Then the boards would drop on to a push-table which would push them long ways. That is not this push-table, it is another one in the mill. It would push them endways until they came to the edge of the table where they were shoved off sideways to the edger, then they would drop down on to a carrier-table and carried east to the trimmer. And the trimmer was located right directly there, as though you inclined a place from the east side of the mill at an angle of some degrees downward and inward of the mill which was in the neighborhood of 30 feet long and 12 feet wide. That had saws in, directly every two feet, so they could put a board on there the full length of the trimmer and cut it up into two foot lengths in one cut, and various places they would saw in between, which would make it a foot, so this was all controlled by the trimmer. They had a number of

(Testimony of H. C. McCann.)

saws so it could be cut [94] into two foot lengths, but each saw was controlled by the trimmer. The business of the trimmer is to operate all these saws, he controls all the saws; by raising them up into the table, they would be in position to saw, and by lowering them, they would be below the surface of the table and would not saw. The saws were worked by the trimmer pressing down on his foot with treadles. There was one saw about every two feet, and if I remember right, in various places, one to every foot. The saws were operated according to the size the boards would have to be trimmed up to. The size of the boards were generally from six feet long to the full length of the table, governed by the condition the board was in. He used the lumber that came to him to the best advantage to make the most lumber out of. When the lumber got to the west side of the trimmer table it continued to move upward and eastward until it got to the upper edge of the trimmer, the east end of the trimmer and the east wall of the mill. Then it dropped on the skids. I will mark the skids "E" on the model. The upper edge of the trimmer was right in there on the photograph. After the lumber reached the trimmer, the man that works the trimmer stood on what would be the southwestern corner of the trimmer and his elevation as compared with the upper end of the trimmer at the east wall of the mill was quite a bit lower. The trimmer sloped back, and he was lower than the lower end of the trimmer. He was up at the southwest corner of the trimmer right about in here, that

(Testimony of H. C. McCann.)

is west of the carrying-table and inside of the mill. From where he stood he could not see the lumber move after it had been delivered over out to the skids. The skids were out as far as the [95] trimmer went, leading on to this carrying-table. The skids extended the whole length of the trimmer, but that is not shown in this model. As a matter of fact, this device extended out as far as the trimmer. After the lumber was put on to the table once, there was a continuous passage from that on until it was dumped on these skids, the lumber did not stop after that, it was carried according to the cut he had made on the board, where it would light. If it was an extra long board it would drop on this table, the push-table, Table A, and by the process of these rollers on the table. These rollers were about six inch rollers, 4 feet long, revolving towards the south. The four to the north were smooth. The last roller on the south of the push-table was what is termed as a dog-roller. It was of the same size as the other rollers, only for the projections quite thickly of steel projecting at various lengths, and pieces of steel like bars would be in there. This part that was removed was about from the dog-roller around in the neighborhood of an inch and a half, maybe a little over, or maybe a little less. With respect to the diameter of the roller it extended about an inch over the top of the roller. These rollers are on the model, this is the dog-roller. The longest lumber came on to the push-table, being that this only took in half of the trimmer, being that

(Testimony of H. C. McCann.)

the carrier-table would only take in half. The part of the trimmer corresponding to the carrying-table extended only about one-half its length, so the short lumber, when it came on the trimmer, fell on the carrying-table, generally speaking, and the longest lumber, if you cut off a short length at the far end of it, the long length would drop maybe on that carrier-table, and the short lengths light on here, and be shoved back on to this table. In the further operation of the mill, supposing it to be in full operation, [96] these bands on the carrying-table represent endless chains. There are four or five of them and they moved eastward at right angles eastward from the movement of the lumber from the push-table. The lumber from the push-table came on to the carrying-table at the same time the lumber was coming from the trimmer on to the carrying-table. The two streams of lumber came together there on the carrying-table. There have been changes made since in this carrying-table, it was extended out further, with skids down here, and then a table a carrying-table extended on out about 138 feet. That was the change made of which I spoke. After the change was made, the lumber was loaded both sides of this long carrying-table. It is carried away from this carrying-table B, it goes over the skids to the eastward and then out on the platform 138 feet or thereabouts long. At the time mentioned in the complaint, to take care of the lumber and get it away as it was delivered in a stream, they had temporarily put in a 2 by 4, nailed so it would

(Testimony of H. C. McCann.)

come just on the top of those carriers on the carrying-table, stopping the lumber at the east side of the carrying-table, and they would lay there until we would pull it off, pulling it to the northward, and then load it on loading trucks which stood on the loading-platform. That is the general operation of the mill. There were four men in the gang that took care of this lumber. They worked in pairs. One of the two in the pair would take hold of this end of the board, whatever it happened to be there, whatever length or size, and pull it off, and the other would stand here, until the other end would come up and just going to drop off, and he would grab it and walk out and load it on to either one of the [97] trucks there. These trucks were push-trucks used for that purpose, two wheel trucks, the wheels about 3 feet wide, I think. There would be only two used at one time. One was placed on the east side of the loading platform, and the other was right up against the push-table, or on the west side of the working platform. There was just walking space between the two. There was not necessarily two men to each truck; it was the various sizes of lumber. We could grade off the lumber according to what truck it belonged to. In the model, the wire on the east end of the side, lengthwise of the east side of the push-table A, represents a shaft, a two-inch shaft running the length of the table, to revolve the rollers. All these rollers, including the dog-roller, were connected with the same shaft. The power was applied to them at the south end of the table, that is, of the

(Testimony of H. C. McCann.)

shaft down in there.

Mr. HAINES.—Before getting through with this *locus in quo*, I would like to call Doctor Hearne, who was called for this injury, and by consent of the counsel, we can get through with him in a little while.

Mr. WRIGHT.—We have no objections. Let the doctor take the stand. [98]

Testimony of Dr. J. C. Hearne [for Plaintiff].

Dr. J. C. HEARNE, on behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. HAINES.)

My name is J. C. Hearne. I am a physician and surgeon. I was called to attend this plaintiff, H. C. McCann, about July 9th, 1907, for an injury. The amount of the bill was given to you. I have a little memorandum of it here with me. July 30, 1907. The amount of the hospital bill was \$248 and the surgical bill was \$200, making \$448. Part of this amount has been paid, \$339.28. It was not paid by him. It was paid by, I think his name is Winder, of the Benson Lumber Company. I had a call from the Benson Lumber Company to see a man who had been hurt at their place, and I went out there and Mr. McCann was brought to my hospital in an ambulance, and upon examination I found that the front part of his foot from the instep, or from the ankle above the instep was badly crushed and lacerated and torn, and I found it necessary to amputate his leg at this position. We call this a Chopart ampu-

(Testimony of Dr. J. C. Hearne.)

tation, it is the name of the man who first performed the amputation. It leaves the heel bone but all the balance of the bones in connection with the ankle are taken off to the end of the big bone, the small bone was taken off, but the heel bone is left intact as we found it there. We tried to save all the leg we could, but that is all we could save. There is probably some soreness where the instrument rubs it, probably it has some soreness. [99]

Cross-examination.

(By Mr. WRIGHT.)

I don't know as I can say that the plaintiff was about the same size when he was brought to my hospital as he is now. I should say that a man of his age, a young man, I would say that he has grown since, but I do not know. I would not swear. I did not make a particular observation as to whether he was an apparently fully developed boy or not. I don't know that I could say. I would say that ordinarily the boy is more developed now, and more of a man than he was at that time. It is only from my general knowledge of the condition of a man seven years later. He was under age at the time this thing happened, because I obtained a permit from his father and mother before I amputated his foot. That permission I have, so I know that at the time he was under 21 years of age. I don't know how much under 21 he was, but he was not 21 years old. I don't know the exact age. [100]

**Testimony of H. C. McCann [in His Own Behalf
(Recalled)].**

H. C. McCANN, plaintiff, recalled, testified as follows:

(By Mr. HAINES.)

As near as I can estimate, the number of revolutions of that shaft is around the neighborhood of 100 revolutions a minute. I never gave any thought to the shaft itself, the shaft being rolled through gears. I don't know whether it is geared up or lower, but it runs, in order to run the rollers at about 100 revolutions a minute. If I remember rightly the shaft runs the same as the rollers, being they were connected up with cogs in such a way that it would have to turn at the same rate as the rollers, making it about 100 revolutions. The shaft was in operation during all the time that the work was going on, sawing and delivering of lumber. This gang of four employees had to keep everything clear, up to the trimming-table, to the time they got the lumber. They had to keep clear all along those skids, and on the push-tables, and on the trimming-table.

Q. On the trimming-table, you mean?

A. On the carrying-tables.

Those four men were the only employees who were charged with the duty of having the lumber that came from the mill, loading them on trucks and keeping the skids and push-table and the carrying-table in operation and unclogged. The mill is not worked that way now.

(Testimony of H. C. McCann.)

There was a device on the east side of the push-table, to keep lumber coming down the skids from going over eastward off the table. It was in the form of a 4-inch plank that in the construction was left 2 inches above the table, or about one inch above the rollers. It was a four-inch plank set up [101] edgewise. It made a sort of a guard-rail on the east side of the push-table. The effect of it was to keep the lumber under normal conditions from going over the east side of the table, and over this shaft.

(Witness marks model G G, where two skids are marked or shown.)

(Witness continuing:) Those two skids G G were 6 feet from the farthest skid, that is at the north end of the whole construction. Each saw on the trimming-table had beside it a chain on either side which held the board up there on both sides even with it, being that each pair of those chains was spaced two feet apart, and it shows here in this photograph that there are three pairs of those come in between the skid at the farther end and the next pair of skids. This photograph is one that was presented to me by the defendant's attorneys when my deposition was taken, as being taken directly after the accident. From this diagram I would give the dimension of the push table as 17 feet 11 inches. The height from the loading table F up to the top of the push-table was five feet 7 inches. I recollect having attempted to look over the push table about the time I was working there. To get a look from

(Testimony of H. C. McCann.)

the loading-table over the surface of the push-table I would have to raise upon my toes, and then I could just scan along with my eyes, so I could see anything coming in between, I could see it. My height was about 5 feet seven about that time, and I had to raise myself up on my toes to look over this push-table. The loading platform was ten feet wide. After changing the mill it was 7 feet, being it was taken 3 feet off there. It was no longer used as a loading-table. [102] The platform is just there, and there is one man works around there. He attends to keeping the two tables clear, the push-table and the skids and the trimming-table, the carrying-table. That was a part of the work that the men had to do before the changes were made, and now they have one man a-purpose for that. The lumber is loaded off elsewhere, on the extension of the carrying-table. They were at work at the extension during the last week I was there. This machinery had been in approximately two weeks before the date of this accident. I had been about there before that time. The only thing that I know of that is of any importance which was put in just prior to those two weeks is the push-table and the carrying-table. Before that time I knew something about the operation of this mill. The trimmer delivered lumber over the wall of the mill down, before they had the push-table and this carrying-table. I helped to operate there. I had been working with it in that shape some time during the two weeks before that. I worked, I don't know exactly how

(Testimony of H. C. McCann.)

long. During that time when there was no push-table or carrying-table the lumber was delivered by skids running clear down to what we term now as the loading platform. The loading-table and those skids ran away down to the loading-table, and also a platform out this way, and is the whole length of the trimmer. We got the lumber to load it off the platform. Those skids came down at about 45 degrees, I couldn't say just exactly how long they were. They came all the way from the trimmer down to this carrying-table, and there wasn't any of this machinery at all. I had been working about two weeks, and the machine stood idle for about a week, and during that time this machinery was put in, this new machinery. I don't [103] know for what purpose the two joists or beams between the push-table and the carrying-table are there, but it was covered with boards, making a little platform in between there. There was a platform there. The height from the loading-table up to that little platform as shown on my plat was 2 feet 4 inches. This does not show the planks across, but there were boards. That was an actual platform, and the height was 2 feet 4 inches from the loading-table. From that little platform or step up to the carrying-table was one foot three inches. The top of the push-table above the carrier-table was two feet. The lumber kept coming down against the guard-rail and bending it and shoving it out and chewing it up. It showed gouges in places. Jams and the

(Testimony of H. C. McCann.)

force of the lumber coming down would occasion that.

In reference to how such a jam arose as occurred when the accident occurred, I have made a diagram here from the board coming down.

Mr. WRIGHT:—May I ask one question to determine whether I want to object?

(By Mr. WRIGHT.)

WITNESS.—I couldn't say that the illustration made here is an illustration of the board that was caught on the push-table at the time of the accident, but it was the position the board was in. It is not so much an imaginary board, the board was in exactly that condition at that time. I couldn't say whether this represents it in its length. It represents it in position. It don't represent the distance that it extended on any of those skids. It is represented as being under the skids, that the board was caught under when I got up on the push-table on the 30th of July, 1907. The illustration represents it as over the roller on the push-table that the [104] board was over when I got on the push-table on the 30th of July, 1907.

By Mr. WRIGHT.—No objection.

(By Mr. HAINES.)

Q. The corner of the board next to the guard-rail on the east you have represented—I will ask you to put letters upon this plat showing where the corner of the board impinged against the east guard-rail of the push-table, and you may use the letter V for that. Where the board went under the skids,

(Testimony of H. C. McCann.)

I wish you would mark it by the letter W, just in between the skids you can mark it. The upper part of this sheet is a representation of the premises there, looking that way?

A. Looking downwards; it is a vertical cross-section. That is, you look down from above. The diagram below there represents a cross-section looking from the east side. This is a vertical cross-section, and the other is a horizontal or plane cross-section.

The diagram referred to was thereupon offered in evidence and marked Plaintiff's Exhibit No. 1, a copy of which said diagram is hereto attached marked Exhibit I, and made a part of this Bill of Exceptions.

It appearing that on November 29, 1909, the defendant had taken the deposition of plaintiff herein and same had been read over, corrected and signed by said witness, as required by law, the plaintiff offered said deposition in evidence as part of the testimony of plaintiff, which said deposition was received in evidence as part of plaintiff's evidence and was as follows:

[Deposition of H. C. McCann, for Plaintiff.]

Direct Examination.

(By Mr. STERRY.)

I am the plaintiff in this action and understand [105] that you are taking my testimony, my deposition; know that you are taking my evidence in my case and that it may be used either for or against me.

(Deposition of H. C. McCann.)

I was nineteen last April, and my age at the time of this accident was seventeen or eighteen—I just passed one of the two; just passed seventeen. I had been working for the Benson Lumber Company approximately a month before this happened. I was employed as a laborer. I was in their employ at the time I got hurt. I was handling the lumber after it came from the mill. I had been doing the same kind of work for about two weeks.

Q. Now, I will show you a photograph. (Handing witness a photograph, later attached to the deposition as Defendant's Ex. I, a copy of which photograph is made a part of this Bill of Exceptions as Exhibit II.) Is that about a correct picture of the carrying-table and push-table?

A. Yes, sir. What you have marked "A" is the push-table, and that which you have marked B is the carrying-table, and this little thing that looks blurred in the picture which is marked C is the roller I got my foot in. These things marked D showing the machinery, are all rollers; they are part of the machinery that brought the lumber over and dropped it on the skids, and they fell from there on to the push and carrying tables. This platform that is marked F, that is where I stood ordinarily. Now, A is the push-table; B the carrying-table, D the machinery that carries it on to the skids, and F the table where I ordinarily stood. I do not know exactly how far it is from the platform where I stood to the top of the push-table. It is approximately about five and one-half feet. As near as

(Deposition of H. C. McCann.)

I can remember it is about five and a half feet from [106] F, where I stood, to the top of A, the push-table; that is my best judgment. Looking at A, I said that was the push-table; I meant the whole thing, not just the little piece. The short lumber comes over this mechanical device marked D and strikes on B and is carried forward, and some of it strikes on the push-table. Through the push-table there are little bars of steel running that keep revolving and shoving the lumber towards the carrying-table, so that the lumber was carried from the push-table forward to the carrying-table. The lumber is carried forward on the push-table by little points of steel running through it, that carry it on. As you look at the picture the lumber is carried to the right and is carried forward on the carrying-table and on the push-table it is carried towards you. Ordinarily I stood on F. I did not have a picaroon; I did not have anything to move the lumber with.

Q. Never had any? A. Yes, sir.

Q. I am not talking about the morning of the accident; ordinarily didn't you have something to move the lumber with?

A. Yes, sir. I had a picaroon; that is an instrument with a wooden handle about three feet long and a steel pick on the end. I had one, then I got another with a longer handle. I didn't have this the day of the accident. Before the accident, I would stand on F, and if the lumber got caught I would at times reach over with this picaroon and

(Deposition of H. C. McCann.)

start it; and before the accident I would get up on the push-table quite frequently; it was a general occurrence, more than once [107] a day, sometimes quite frequently during the day, nearly every day two or three times and sometimes many times a day. I got up there for the purpose of dislodging the lumber. I had never been hurt before this accident, and that time I got my foot caught when I got up on the push-table and part of it was taken off. I did not receive any other serious injuries outside of my foot; it was just my foot that got caught.

I do not know how it happened that I did not have a picaroon; the accident happened in the afternoon and after I returned from lunch my picaroon was gone; I do not know who had taken it and I didn't have time to inquire of anybody; I didn't ask anybody for it; it was about an hour and a half after that when I got hurt. There were persons working near me, a man by the name of Smith, I believe, and a man by the name of Coffin, and a Greek, George Kaludis; these men were right around me. I could not say whether any of them saw me get hurt.

At the time of the accident I got up on this push-table to get out a board that was lodged up in there; I believe it was an inch piece about ten feet long and eight inches wide; it got lodged under the first pair of skids and across here on this push-table; it was just one board, and if that had stayed there, there would have been a jam; the boys would shoot

(Deposition of H. C. McCann.)

down the lumber so fast there would be a jam up there.

Q. Before this day of the accident, how did you get up on this push-table, when you started up before this time?

A. Well, I just stepped on to here, and then here, and [108] then over. Indicates on picture.

Q. You see if you say here and here, that wouldn't mean anything to anybody. You stepped from F on to B?

A. No, sir; there is a small part right in there (showing) that don't show.

Q. There is a small table in between this A and B that doesn't show? A. Yes, sir.

Q. You would step on to there? A. Yes, sir.

Q. And from there to B? A. Yes, sir.

Q. And from B to A, the push-table?

A. Yes, sir. That is more of a step than a table, which does not show on this picture. I stepped from Platform F on to this small table or step; then on to B, the carrying-table, and from there to A, the push-table. I would step right up over that revolving roller. I could step over it quickly without getting hurt. This C that I describe as that revolving roller, that is termed a dog-roller; the roller is about an inch above the push-table. You cannot step over it easily; it's a fairly long step. You cannot necessarily step over it easily after you get used to it. I had to step from B. I did that several times every day, and sometimes a great many times a day. At times when there was a

(Deposition of H. C. McCann.)

truck there with-lumber piled just right could get up from F on to the push-table and not go over the dog-roller, but if the lumber was either [109] too high or too low it wouldn't be any good; if there happened to be a truck there, by standing on F I could climb on to the table. If you go up by the dog roller there is danger of getting hit by lumber. If there wasn't any lumber there, there wasn't any danger. If you are once on there, there isn't anything to hit you except the lumber coming over. When high enough on the table, by looking you can see the lumber coming, but you couldn't from F, when standing on F, until it reached D; that is a mechanical device that throws it over.

Q. What do you call that? (Indicating on picture.)

A. I would call that the trimmer. When standing on F you could not see it reach this part of the trimmer until it came over the trimmer, but when you get on A you can see if the lumber is coming or not, from B you can't see it, but you can see it from the top of the push-table.

If I had had my picaroon I would not have reached around and got this piece of lumber loose; I do not think I would have pried it. There was a truck there, but I do not remember, but think there was some lumber on it. I do not know whether there was enough on it; I would not undertake to say. I could see trucks of lumber standing all around. I thought the truck was too low, or too high, I don't remember which, to go up on. I

(Deposition of H. C. McCann.)

have gone up on trucks of lumber, but I generally went over the way I went that day. I was in the act of stepping over and the next thing I knew my foot was caught. There was a little board down by the side there, my foot was caught between the edge of the board and the roller. [110] I could not say what the board was there for. I had seen it there very often. Of course, when I stepped over I knew the roller was there. I do not know how it was that I happened to get my foot caught that time; it was done so quick—just like a flash. My intention was to get that board out because there was other lumber coming, and the next thing I knew my foot was caught, even before I had any pain at all. I intended to make the step the same as I had usually made and clear it, and suddenly I felt my foot was caught, and the next instant it was being crushed. Most of it was taken off with the machine; the remainder was taken off by the doctor. I cried out, and my fellow-employees came right away.

I did not know what had become of my picaroon. I couldn't say whether anybody had swiped it. I had never been told about getting on this push-table. No one had ever said anything to me about it; I had orders to get the lumber out and had orders to keep it clear. I had one order, that was to get up and get that board out. Mr. Keltie, the foreman, he came and gave me that order; that was before that accident. That was the only order I ever had about it. Mr. Keltie was our foreman. I never spoke to him or ask him if there was any way of

(Deposition of H. C. McCann.)

getting up except over this dog-roller. I never made any complaint to anybody about it. I had no idea that I was going to get hurt the day of the accident when I considered going up over that dog-roller. I had done it probably a hundred times and had no idea that there was any danger to me of an accident, until my foot got caught. [111]

When I say the board was caught in the first pair of skids, I mean the first pair counting from the farthest end from the carrying-table, this pair of skids marked GG. A larger part of the board was resting on the push-table. It was lying flat. When I saw it get in that position I was on the platform marked F, and when I saw it I went right over to B; I didn't wait at all.

I was getting two dollars and a half a day at that time. I have been working since I left there; am now working for an automobile company; have been making a dollar and a quarter and a dollar and a half a day; I have been working for this company about six months. I would not be able to go back to do that same kind of work, if I had it to do, as I wouldn't be able to be on my feet so long, doing any such heavy work. I can hardly tell if my foot is getting better; it seems to get better and then it bothers me. I do not use crutches. I have used them; that was when I first got up, but haven't used them *since have* been out and around working. I was a very strong, active fellow before I was hurt; I could lift lumber and do any kind of rough work. I did lift lumber. I do not believe that I am quite

(Deposition of H. C. McCann.)

as strong and active now; I would not be able to do the work I done before in the condition I am now. At that time I could handle long pieces of lumber by myself and when I handled these I loaded them on trucks and did the work that other men did. I could have unloaded them by myself too. [112] When unloaded we usually called a man to help us, would not go to them when needed physical assistance as they would always be there; we all helped each other as people working side by side usually do. This man Coffin and this Greek, we were all in one gang. I was not over them in any way, we were all under Mr. Kelty.

Mr. STERRY.—I ask here to attach this picture to the deposition and make it part of the original record and marked it “Defendant’s Exhibit I.”

The picture referred to was thereto attached and marked “Defendant’s Exhibit I.”

Cross-examination.

(By Mr. HAINES.)

This accident occurred on July 30th, 1907; my birthday is April 15th; I was born in 1890.

In the manufacture of lumber and running this mill, the log was put on to the carriage; it was drawn up from the water and put on the carriage and there taken and drawn back and forth, each time going forward it would saw off a board and the boards would drop on to the roller-table, then it was carried over down to the edger sideways through the edger and drop onto a carrying-table, then it was carried from there to the trimmer and down to the push-

(Deposition of H. C. McCann.)

table. From the carrying-table it went to the trimmer, then through the trimmer it dropped down on these skids and from there onto the push-table. Up to that time the process occurred outside of the mill and from there on the short lumber dropped down on to the carrying-table; on the push-table outside of the mill it was carried endways and then dropped [113] down to the carrying-table; this was a continuous process from the time the log was drawn from the water on to the carrier for the saw until it reached the carrying-table to be loaded. As to the character of the work as to being strenuous and requiring hurry and attention and as to noise and confusion, you could not hear a man talking right alongside of you unless he hollered; as to the hurrying part, the machine was continually running lumber, it was coming right along, so in order to keep up with the machinery you had to hurry. When a jam occurred there was an arrangement for stopping the mill in some parts of the inside, or from the engine direct, the engine that propelled all the machinery of the mill; in general, the power was all furnished from one engine in running all these different portions of the mill.

These jams that occurred required loosening up after they left the mill and were caused by different pieces of lumber coming down, either coming down not straight as they should, or short pieces falling down would be between the rollers or between the carriers and when the next piece would come it would fall on top of them and that would hold it off the

(Deposition of H. C. McCann.)

carriers or rollers. Quite frequently a piece would come down crooked and would drop into this pit, right below the skids, stand up endwise, that one thing sticking up there would catch the other lumber coming down and hold them up on the skids or turn them more endwise and then there would be a jam in there; that state of things would happen quite frequently during the day when the mill was running. I could not give any number of times that it would happen during the day but you had to keep continually watching [114] out for them, they were getting in the way frequently. The trimmer was just inside the mill and from the trimmer it was carried outside of the mill on to these skids. At times the stream of lumber coming over from the trimmer on to these skids was every portion of a second at other times it was slower. It was according to how the lumber come from the trimmer, he would cut it as fast as he could, and it would take little time to send it through, then it would start running stuff, and you just had to keep up. The lumber came over on to these skids as fast as it was sawed all the time from morning until noon, and from time work commenced after dinner until night, with the exception of changing the saw which would take a slight time about the middle of the morning or the middle of the afternoon, and at other times the process was one continuous run of lumber from the saws down to the carrying-table. There were three men working with me to take care of the lumber as it came from the mill, we were working in pairs handling the lumber. It really required

(Deposition of H. C. McCann.)

two men to work together, and there were two pairs of us handling all this lumber that came from the mill, and part of our work was to load it upon the trucks down here on the platform. It was the duty and work of any one of the men that was nearest to it to release any jams that might occur either on the skids or push-table. There were no other men employed other than we four, to do that, there were four that were working there together, and no one else was employed to do that work but we four men. I was the most active of the gang in which I was working. I was then about seventeen years, three months and a half old. [115] I was very well grown and strong for my age. The other men went up there at times, but I did the most of it.

Mr. Kelty was yard foreman. I have forgotten whether I went to Tim Kelty direct or to Mr. Evenson. I went to the office and got employed. From Mr. Evenson first; that was about five weeks before the accident, but there was an interruption in the work during that time, they were putting in new machinery, it took about a week. When I resumed work I believe I was employed by Mr. Kelty, he hired me to go on when work was resumed and I continued to work on then until I was hurt.

Q. You said something in your direct examination about Kelty ordering you to do something with respect to releasing a jam of lumber; state just what was said, and when it was, how it came about.

A. As to when it was—when I first started to work on the table, sometime around the first few days.

(Deposition of H. C. McCann.)

Q. On what table?

A. On the carrying-table and push-table, and my attention was in a different direction from what the tables were, and he come up right close to me, and he says, "Get up and get that out."

I looked around, and there were several pieces of lumber on both tables, and he come down to where I was standing alongside the carrying-table with my back partly towards the push-table, and asked me to get them out. I was alongside the carrying-table on the platform, that's where I stood to take hold of the lumber and put it on the trucks. I had my back towards the carrying-table and the push-table. [116] There was a jam right here on both tables, and when such a jam occurred, if it wasn't loosened up the lumber would keep on falling up there, and eventually it would cause about three or four times more work, or else the entire mill had to be stopped in order to get it out. Mr. Kelty told me to get up and get that out. I went up on the carrying-table and got that out, and then got up on the push-table and got that clear as quick as I could. I stepped over this roller. I do not remember how that jam occurred on the push-table at that time. I had a picaroon to use at that time, the one that was furnished by the company was about three and a half or four feet long, the handle to it. I furnished myself with another one about five feet long, I believe. I got a longer one in order to reach the lumber from the platform to save me getting up. When a board got stuck between a pair of these skids, with one

(Deposition of H. C. McCann.)

end down underneath and the other sticking out, it could not be loosened with a picaroon by standing on the platform F, it was not possible to do it. If a board should become lodged in that way, with one end sticking under the skids and the other sticking out, you could not loosen it up and get it out with a picaroon by standing on platform B. When a board was stuck in that way between the skids pulling down on the board would do no good, you had to get up and lift it up so as to get it out.

On this occasion, when I got hurt, the board stuck between two skids, marked G, being the first pair farthest from the spectator looking at the picture. It wasn't sticking down, it was up, under and across this push-table. [117] The end of the board nearest the mill was in under this pair of skids; it was under the further one, although the end extended clear across and under the nearer one too; that is, it comes from here right across under there, and stuck out here, the end of the board, a little ways there. As accurately as I can tell how that board was stuck in between those two skids and where the end nearest the mill was, the one end was over here laying flat against the table and one end lodged against the right side of the table under there, and under across under that further skid and across.

Mr. STERRY.—You mean that the board instead of lying straight, it was lying diagonally across the table on a slant, so you could not stand on this table and pull it out?

No, sir, the rollers were binding it up underneath.

(Deposition of H. C. McCann.)

I mean the rollers on the push-table, the rollers were working against this board, or some other board and binding it in there tight. It could not possibly have been removed by a picaroon from table B or platform F. When a jam of that sort happened we uniformly did as I did that time, got up and got it out—on top of the table. Either I, or one of the three other men working with me did that.

Mr. Evenson was general manager of this mill, and he was about the mill seeing this work go on where we were working. Mr. Evenson saw us get up there many times. He was about the mill constantly. He never cautioned me about this dog-roller or explained to me anything about the danger of the work there. Mr. Kelty never gave me any such caution; he knew the men were doing this work in that way. At the time Mr. Kelty told me to get up and release the jam, sometime before this accident, I got up on the carrier-table—being at the first place, I cleared out what there was there, and I got [118] up on the push-table, the same way I did when I got hurt. Mr. Kelty saw me go up there.

Q. Did he tell you what the nature of this work was, as to keeping you on the jump?

A. Well, we had to keep it cleared out as fast as the lumber came, else the mill would get ahead of us.

It was constantly heavy work; had to keep on the move from morning till night unless the mill happened to stop, when they were changing the saws, or something like that, then we would get a little rest. It was the hardest work I ever did, and the

(Deposition of H. C. McCann.)

other men thought it was extra hard work for them to keep agoing; it was continually handling small and large lumber; smaller lumber would come faster than the large, so it was about all we could do to keep up with things, keep the lumber clear, and the tables in such a way that they would receive more lumber without being jammed up.

Before Mr. Kelty gave me orders to clear out lumber, I had been in the habit of going up there very little. When he gave me that order I got up there and used my hands. We had a picaroon there. I never just had it in my hands; I did not take the picaroon to loosen up, I did it with my hands. After this direction from Mr. Kelty, whenever a jam occurred that could not be readily released with the picaroon, either I or some of the other men got up there and cleared it out. Mr. Kelty was around there several times a day, knowing what work was going on, overseeing it.

The general nature of the injury which I suffered was—I lose the forepart of my foot, just the ankle and heel is left, I was in the hospital five weeks and four days, I believe. [119]

There was a truck alongside the push-table at the time this accident occurred; it was standing alongside the push-table; I was standing alongside the carrying-table.

Q. Which direction was the truck from you?

A. Well, it was (showing by the picture) away from me there.

It was down on the same platform I was standing

(Deposition of H. C. McCann.)

on; there was no team hitched to it, just a small two-wheeled truck; these were not trucks worked by horses, simply push-trucks. When lumber was loaded upon them we would put one end on a little horse we had there and aim to balance the truck as near as we could. The reason why I didn't try to get up on the truck, it was either too high or too low, I recollect it being one of the two; if I remember just exactly right, it was piled up exceptionally high with pieces that would have fallen off if I tried to get up on the side and climb up the side. The most convenient way was to get up on table B.

After I got out of the hospital I was disabled about six months before I was able to do anything to be considered. I next worked at running an elevator. After I got out of the hospital and commenced working in the elevator I was not able to be up on my feet much. I could sit down in the elevator a greater part of the time. I believe I was running the elevator about six or eight months after that. I am not able to do manual labor which requires me to be on my feet. I am now engaged in soliciting tourists for an automobile company.

No one in authority about that mill ever cautioned me about any danger in getting up and down to clear out those lumber jams. [120]

When one man of this gang of four was up on either of those tables, that left one pair broken up, and it was necessary for him to get back as quick as he could to help his partner load lumber. It was absolutely left to us four men to see that these jams

(Deposition of H. C. McCann.)

were cleared up when they had them, there was no other person or laborer provided to do that, no other means provided than the labor of one of us four men.

The last I knew of Mr. Coffin, he was in Ottawa, Minnesota. I could not say where this Greek is, the last I saw he was around town here, and I couldn't say where Smith is. [121]

Since this action was begun I got an artificial foot, or appliance to my foot; the expense for that was \$65 and my expenses of travelling up and staying in Los Angeles until I got the limb, having it tried on; the fare and lodging where I stopped would be about fifteen dollars in all. This injury has affected my health in a way; it has weakened me; I can't exercise as much as I did before; it has injured my system in that way to a general extent; I do not get as much exercise, and do not keep in as good health as I was before; my nervous system is very much put out, my nerves are not in condition like they were before in any way; at times much more unstrung.

Redirect Examination.

(By Mr. STERRY.)

I couldn't take the picaroon and force the plank around in a straight position and drag it out on to the platform because it was caught and was binding with the rollers. You can't shove it with a picaroon; you can only pull it out. The people could not have heard me had I called on them to help me. When Mr. Kelty ordered me to go up there it was the first few days I was working on this new machinery,

(Deposition of H. C. McCann.)

which had been put in during the time I was laid off, this here push-table and carrying-table.

Q. Before that you had been on the push-table very little?

A. Before that, it was just a few days after I had this lay off.

Q. But you, whenever there had been a jam, you had gone up there and gotten it off? [122]

A. After I started to work again after they had this new machinery in, I worked mostly from the ground; with a picaroon it would have taken longer to do it.

I had been up there before once or twice, and I believe I went the same way. The day of the accident the conditions were the same as when Mr. Kelty ordered me up there; the machinery and everything was the same way; there wasn't any change in any of the machinery after they put in this push-table and carrying-table; the dog-roller and all those were just the same. The accident happened in the afternoon, about two o'clock, I believe. I couldn't recall the time exactly.

Q. Of course you knew it would be easy to get your foot hurt if you got your foot caught in the roller? A. I never gave any thought to it.

Q. You would have if you had stopped and looked at it? A. Not necessarily.

Q. You knew it was revolving? A. Yes, sir.

Q. You didn't mean to get your foot in?

A. No, sir. But as to knowing it would be dangerous, I never gave any thought to that.

(Deposition of H. C. McCann.)

I would not have experimented or stuck my foot in it if I could have helped it. I intended to step over it and by it. I would not have gone if I had known I would get my foot caught.

If this jam would continue for fifteen or twenty minutes it would delay us more; it would have been impossible to clear it off without stopping the mill; they stopped the trimmer, and it had to be stopped coming down there; you can stop the trimmer without stopping the mill. As soon as they stop putting in lumber, we can work right along then. [123] I had seen that done before the accident.

Q. You didn't call out to anybody to help you; you started right ahead to fix it?

A. But he can't stop the lumber after he gets it onto the thing—

Q. (Interrupting.) Well, he could if you would call out to him.

I refer to the trimmer; if he had stopped the trimmer that would have stopped the lumber coming over. The lumber was coming in a continual stream; there would be times the lumber would come very fast, one piece after another, and then again there would be times it would come slower; you couldn't describe it because it was irregular; it wasn't one continuous rush of lumber like a waterfall, but it was practically continuous; there were three other men, all men older than myself; I was the most active of all; I did as much work as any of them; I believe I was practically a man grown as far as my body is concerned. I was strong

(Deposition of H. C. McCann.)

enough to do the work that these other men were doing.

I have never thought how long it would take to load a truck, one of those hand-trucks, so the lumber would be right to get up on. I have loaded those push-trucks of lumber. If you had the lumber right there, just simply had to pile it on, I suppose I could load a truck in as much as about fifteen or twenty minutes. It would take some time to unload it, it depends on the size of the lumber. It was generally more convenient to go up over this dog-roller than to go up on a truck. I have not been in the mill since this accident. I have testified about the way the machinery [124] was operated; those were all things that I knew myself; I knew myself in a general way how the mill was run, and knew how the machinery was operated; I never had any experience before this. When I went to work there, I studied the machinery and went to the man in charge of it whenever I didn't understand something about it, so that I understood the general operation of the mill. Before the accident I had a number of minor injuries such as any boy might have; I had a nail in my foot.

Recross-examination.

(By Mr. HAINES.)

This trimmer was inside of the mill; that is, right on the edge of the mill when it drops off the trimmer outside the mill. The edge of the trimmer shown in the photograph is virtually in the outside wall

(Deposition of H. C. McCann.)

of the mill; one man looked after the trimmer and he is inside of the mill; just before the lumber comes through the trimmer it goes through the edger and two men look after the edger; the next process is the carrying of the logs by the band-saw. If we men on the outside of the mill saw a jam occurring and wanted to notify the trimmer, we would have to get up on either one of the tables and signal to him, if we just happened to catch his eye; he could not hear us if we shouted; they would do it by signals. He could not hear us on account of the noise of the machinery and the running of the mill. He is away at the other end of the mill from the carrier of the logs and the band-saw; I should judge the mill is about one hundred and fifty feet from the band-saw, and he would be that far away. We could not see the trimmer from the [125] ground, from platform F. We could see him from the carrying-table, platform B. We would have to get up there to call his attention to the fact of the jam occurring. He could not see the jam occurring on the push-table from where he stood; when the trimmer stood at the place where he worked, I do **not** believe he could see a jam occurring, down on the push-table. I recollect instances where the jam got so bad he had to be signaled to to stop; he would keep sending the lumber down, and I would start to signal to him. I would throw something over to him, a block, to draw his attention and have him stop. An instance of when I did that, I was on the ground, busy clearing away the lumber that had

(Deposition of H. C. McCann.)

come down that was on the carry-table, and there was a jam coming on both tables, and I called his attention to it, and it was piling up in such condition that we could not get the lumber out safely without having the trimmer stopped, so I got up on the carrying-table and got his attention and had him stop, and we got this lumber out as quick as we could and had him go on with his trimming. We could not make him hear by shouting on account of the noise in the mill.

If we got these trucks loaded up we would lead them away; the men that was loading cars, when they run out of work they would go out with them, so the work was divided between us four men and the men who were loading on the car.

When I directed the attention of the trimmer upon these occasions where a jam got too bad to be released and they stopped the delivery of lumber, the mill did not stop, just stopped putting lumber in and passing it over on the push-table [126] until the jam was released; the lumber would accumulate on him at that time and crowd up on him and greatly push on his table, and if he stopped for a moment delivering lumber over on the push-table that would make an accumulation, it would hurry the process when he commenced again, then there was a rush.

This machinery that was put in during the interval when my employment stopped and before Mr. Kelty re-employed me was the push-table and the carrying-table; they had not been there before;

(Deposition of H. C. McCann.)

they were the new machinery. They had been there about two weeks before this accident occurred; I had worked during those two weeks, and it was during that two weeks that Mr. Kelty ordered me to get up and clear out the jam. Both the push-table and the carrying-table had been put in during the interval I was not employed there, and had been there only about two weeks.

Redirect Examination.

(By Mr. STERRY.)

I had been working ever since they had been put in at this same work.

Recross-examination.

(By Mr. HAINES.)

There had been no accident of this sort occurred during that two weeks to anyone. There had been nothing special to call attention to the dangerous character of those appliances, this dog-roller.

Redirect Examination.

(By Mr. STERRY.)

My eyesight and hearing was perfectly good.
[127]

The picture attached to and referred to in said deposition and marked as Defendant's Exhibit I is hereto attached and made a part hereof and marked Exhibit II. [128]

TESTIMONY OF PLAINTIFF CONTINUED.

[Testimony of **H. C. McCann**, in **His Own Behalf**
(Recalled—Cross-examination).]

H. C. McCANN, recalled for cross-examination, by Mr. Wright, testified as follows:

In the last two weeks I made the drawing which has been introduced in evidence, and marked Plaintiff's Exhibit No. 1. I made it after a thorough examination of the machinery at the Benson Lumber Company Mill. I made the last examination within the last two weeks. I said I had been studying at a correspondence school around the neighborhood of six years. I went to the mill about two weeks ago for the purpose of making measurements from things as it was at that time, and made a drawing as it was at the time of the accident. I went to the mill two weeks ago to enable me to make an accurate drawing of the machinery as it was on the 30th day of July, 1907; not necessarily for the purpose of familiarizing myself with the conditions that exist there at this time, but I wanted to have everything in my mind when I came here to testify, the situation of the push-table, the relative position to the carrying or receiving table, and the trimmer. I went down there for the purpose of refreshing my mind about that, and to enable me to make this drawing. The last time I went down there was about two weeks ago. I have been there previously. This accident was six years ago the 30th of this last July. I had been down there several times; I couldn't say the exact number. I was in the hospital, I think, about

(Testimony of H. C. McCann.)

five weeks after the accident. I went down there some time after the accident. I have been down there a number of times since the accident. I walked on crutches for a while. I believe I did go down to the mill before I discarded the crutches. I don't remember what I talked over with the [129] employees at the mill. There were three other men besides myself at work at the time of the accident, on these tables. Their names were Coffin, Smith and Colompy. They were doing the same labor that I was performing. I don't know how long they had been employed there, or whether they were older employees than myself. I don't know whether they were at work at the Benson Lumber when I was employed, or not,—I don't remember. I don't remember whether any of them were employed and came to work after I began to work there, nor do I recall going down after the accident while I was still upon crutches, and talking the matter over with them. I remember going down, but I don't remember whether I talked it over with Mr. Smith or not. I don't remember that Mr. Smith came up to the hospital, and I don't think he did. I do not recall that Mr. Coffin came up and talked the matter over while I was in the hospital. I do recall having talked over the circumstances connected with the accident, with an employee at the mill, since the time of the accident. Some time afterward I saw Coffin,—I think it was at his house. I cannot say how many times I have been down to the mill since the accident. It was some time after the accident before

(Testimony of H. C. McCann.)

I could take employment anywhere, and I went down to the mill before obtaining employment elsewhere. I cannot say whether I went down, once or twice, or several times, but I remember very distinctly that I was down there. I did not go down necessarily for the purpose of making measurements of the machinery, the push-table and carrying-table, nor did I make measurements while there. I don't know exactly when certain changes were made in the push-table and the carrying-table and the various devices there [130] for handling lumber. It was a short time after the accident though, that some of the changes I know of were made. When I first returned to the mill after the accident, some of the changes had been made. The push-table had been raised—I mean the carrying-table had been changed, and the men were hauling the lumber from below, instead of up on top, as they were at the time I was there. When I first went down I don't remember whether any change had been made in the push-table or not. It was within the last two weeks that I made the measurements of the push-table and carrying-table and the platform, the trimmer and the skid. Before the changes were made I had not made any measurements of the mill.

In regard to my estimates of the length of the push-table indicated by the letter A in the model, and of the length of the carrying-table indicated by the letter B in the model, and the height of the push-table from the platform before the changes were made, although I made no measurements prior

(Testimony of H. C. McCann.)

to the change, the way I am satisfied with them was that I knew the length of the carrying-table. There was a certain size of the lumber that would go over that, that could not come out over the trimmer, and that took in just about half of the push-table, the push-table having five rollers on set at a square. That is, they were four feet long and four feet apart, would give an estimate there. As to the height of the push-table, I judged by my own height. I have already testified as to the height of the push-table prior to the alterations, because I remember its relative height to me at the time I was working there. I was five feet seven at that time, and my present height is five feet ten. My weight at that time was about 140, [131] and now it runs 170. At the time of the accident, the push-table indicated by the letter A in the model was about as high from the platform as I was tall. The distance of the push-table from the carrying-table at that time was approximately two feet. I don't know as the workmen were supposed to stand between the push-table and the carrying-table. They did not stand there. I went in there between those two tables while the machinery was running. It had been five weeks since I was first employed in the mill, but I had a week's lay-off between that time. I had been through the mill prior to the accident. I knew where the saw-logs were taken from and carried up to the sawyer. Roughly, I knew the entire process then as well as now. I was practically as familiar with the machinery of the Benson Lumber Company

(Testimony of H. C. McCann.)

Sawmill at that time, except I didn't know the measurements. I knew the general course as to how the lumber was handled, how it was carried up to the trimmer and carried down the skids to the table, and then lengthwise on to the receiving-table, and then loaded from there on the lumber trucks or lumber buggies, and disposed of. I had been through the mill.

I knew some of the measurements then. I hadn't made them; I didn't need to. They were measurements that were laid out on the different machines themselves. This machine was built while I was in the employ of the Benson Lumber Company, that is, the push-table and carrying-table. I was already working there prior to their construction and use. I was not about the mill during their construction. There was a period of about a week during the construction of those appliances that I was not at work. This push-table and carrying-table was put in during that time. I don't believe I was down there [132] during their construction at any time. During the week I laid off; I had a vacation. If I had gone back, it would be simply to see when we were to start running again. I don't recall whether I went back,—I may have gone back the latter part of the last week, and that is the time they told me to come down Monday. Maybe about a day before I might have seen this machinery that was installed there during my vacation, before it was actually in operation. It was new machinery. I just took in the general scope of the new machinery, that is all.

(Testimony of H. C. McCann.)

I am interested in new things. Interested enough to become a student of mechanics, and take lessons in this kind of work. I suppose I could say I was interested in mechanics. I believe those things interested me a little more than ordinary matters that mechanics have to deal with. When I went down there and saw this machinery, I don't believe I examined the spike-roller or dog-roller. When the machinery started running, I found out the purpose. I didn't know the purpose before it started to run. I knew this machinery was for the handling of lumber, but what the purpose was I didn't know until after the mill had started running again. The elevation of those rollers, including the spike-roller, above the level of the surface of the push-table, is about one inch. I measured those heights. I measured them in the last two weeks, and previous to that I knew they were just that height, because when an inch board, a short end, would fall down in between the two rollers it would be just sufficient to hold any other board coming down on top, hold it just a little ways away from the roller. To my knowledge the rollers are the same as they were at the time I was injured, and the same height above the surface [133] of the table. The spike or dog-roller is the same as it was when I was injured, with the exception of the spikes, they have worn down considerably since then. That is not the only change I have observed. I observed that the board right directly in front of the spike-roller was not there. That is the board that I marked X on the model.

(Testimony of H. C. McCann.)

That board is removed from the spike-roller about an inch and a half, to estimate the exact distance, or maybe two inches,—in that neighborhood. In regard to the distance from the cylinder or the spikes under the roller as they came around, it was left just clearance enough from the spikes for them to clear, maybe an inch and a quarter or inch and a half, maybe as close as an inch, it might have been. The exact length of the spikes I don't know. They were about an inch long and the board was about a quarter of an inch from the edge of them. The spikes were irregular in length, and averaged from about three-quarters of an inch to maybe a little over an inch. I think there was about a quarter of an inch space from the end of the longest spike to the board, but I couldn't say, because the board was never in after I was down there. At that time that board was not part of the frame. As to how near to the top of the dog-roller or spike-roller that board projected, it came up within about on a level with the table itself. I believe it was about an inch below the cylinder of the roller itself. I think the elevation of the upper edge of the board that is marked X on the model was on about a level with the surface of the table, so that it left about an inch space between the top edge of that board and the top of the roller. I was employed—I don't remember as to where I was employed the first time, and then after the lay-off, Tim [134] Kelty put me back to work, being he was my foreman before the lay-off. Mr. Tim Kelty was foreman, that is, of the portion of the mill in-

(Testimony of H. C. McCann.)

cluding the carrying-table and push-table, and he had charge of the logs out in the bay; I think he had charge of that. I couldn't say as to whether he employed me in the first instance—I was employed by the office. I went down and made application for a job—if I remember right, I went to the office and was employed, and who put me on I couldn't say. Prior to the accident, once or twice my work was out on the logs, out on the bay. I was put out there. That was when I first went to work. I worked there only just a half a day or something like that. There would be times there would have to be extra work done out there, I would be sent out to do that work. I also worked on the raft. That is one of the large rafts that brings the logs down. I think I put in a few hours one day along there at the edge of the trimmer. The board partition just simply comes down to the roof, just a short distance, and leaves all open below that. The board wall comes down and leaves a space, and down below the trimmer it is all *board* up, if I remember right.

In regard to the photograph which is marked Exhibit 1, attached to the deposition which has been read in evidence by my attorneys, that is a correct representation of the plant at the time I was injured. Letter "A" was to represent the whole table, the push-table. The board or frame where the letter A is, looks like a portion of the frame around, the boxing, the end part of that shaft. The shaft that ran alongside of the push-table turned all the rollers, on the push-table; and also turned the spike-roller or

(Testimony of H. C. McCann.)

dog-roller. As to which is the [135] correct name, the dog-roller or the spike-roller,—I always knew it by the name of dog-roller. That portion of the table represented by the letter C is the dog-roller or spike-roller. The board or portion of the board in front of the dog-roller is correctly represented by the photograph, with the exception of being chewed out on the top. It does not come as near the surface or as near to the surface of the push-table as the dog, because the lumber dropping down would keep breaking it out and chewing it off. Except for that the photograph gives a correct representation of the push-table as it was. As to whether that is the only exception, there might be some other changes, technically, I couldn't say. There are no details. At the present there is nothing that attracts my attention.

I testified the letter F in the photograph indicated the platform on which I worked. I couldn't say whether that letter F does not represent the lumber on top of one of those lumber buggies. I have not looked at the photograph. If the photograph shows something on that end, I can't see what it is; it does not show the platform here out as it extended at that time. There are only three boards in the photograph. I can't say whether the third board seems to be the end of it, because it runs off the photograph there. The platform extended clear across to the other platform. You start at that platform and walk clear over to the railroad track. That it is in the northern direction, to the east from

(Testimony of H. C. McCann.)

the push-table the platform extended 10 feet, so as to get plenty of room for two push-carts or lumber buggies. They ran alongside each other. There was one at each side and I walked in between [136] them. When I went up on this push-table, I went up from the platform there. When I say platform there, I mean the platform indicated by the letter F in the exhibit. When I wanted to go up on the top of the push-table, I stepped up on a little platform between the carrying-table and the push-table which I testified in regard to in my direct examination. It was my habit, when I wanted to get on the push-table, to step from the platform F on the small platform, being between the push-table and the carrying-table. From there I stepped up on the carrying platform, the carrying-table, and from there to the push-table,—I jumped up on the push-table. From the carrying-table or receiving-table indicated by the letter B I jump or step upon the push-table indicated by the letter A in the model, and also in the diagram. I would call it a good, big step from B to A, that is, from the carrying-table to the push-table. I never had time to measure how long it was; I should judge it was about three and one-half feet, around in that neighborhood. I made a quick step. In other words, before one foot had entirely left the carrying-table, my other foot was upon the push-table. As the machinery was situated at that time, if necessary you could stand with one foot upon the carrying-table, the other foot upon the push-table. I never tried it. The height of the surface of the push-table was

(Testimony of H. C. McCann.)

about two feet above the height of the carrier-table. I would mount the push-table while the machinery was running. The lumber would be coming down. If it happened to be coming down you would have to watch out for it. I would have to watch out, that is, take the stream while there wasn't any ripples in it. That was the most frequent way I had of getting [137] up there,—that was the way that was generally used. We all used that,—all the workmen that got up there. Different ones got up there at different times. I wouldn't say I saw them all get up there. I saw Coffin get up there, over the roller, and while the machinery was going. He got up there to clear out some lumber up there. I can't say how long it was before I was hurt that I saw him get up there. Mr. Coffin was my partner to work with, you might say,—had the same labor to perform, that I had, and the same that the other two had. There were four of us working at that time, and we were working in pairs. Coffin and I constituted one pair, and Mr. Smith and another gentleman constituted the other pair. And the two pairs worked together.

In regard to this model, I couldn't indicate just where, on the model, I was standing, and where Coffin was standing, and where Smith was standing, where they worked the day the accident occurred. They were some place on this platform. As a rule, they stood up on this end, the south end, of the loading platform. I couldn't say exactly who stood next to the push-table. You stand around there, in different places, wherever we could efficiently do our

(Testimony of H. C. McCann.)

work. My duty was to remove the lumber which was coming down, the continuous stream from this receiving-table on to the car. That was not all my duties, but the principal part of the work. I couldn't say that I stayed in any particular place. As to getting in each other's way if we went about picking up lumber, we would have to pick the best place. Only one pair is handling a piece of lumber, then the other would take the next one. When a plank came down one would start and pull it out, and the other [138] one of the pair would take the other end and load it onto the truck, whichever truck it had to go on.

Q. Of the four men at work, there was *only* of the four stationed at or near the south end of the push-table? A. Not stationed there.

Q. Was there any one that was there a greater portion of the time?

A. I generally stayed there, and Coffin stayed there, that is where we had to work.

Q. You were working in pairs, and the pair you were working with on the 30th of July, in the afternoon, was working on the push-table?

A. We all worked on the far side of the carrying-table. It would come there, and that is as far as the lumber would come. I worked from the carrying-table. I didn't work up on the top of the carrying-table. Frequently I got upon there. They told me to get up there. Kelty told me to get up there. He didn't tell me frequently, but he told me to. It was necessary to get up there. It was necessary to get

(Testimony of H. C. McCann.)

up on the carrying-table to get out different pieces of lumber that would come down either crooked or in various kinds, that would interfere with the general run of the machine. I had a picaroon to enable me to get the lumber started that was on the carrying-table. With the use of that I could not entirely avoid getting up on it,—I couldn't reach the 20 feet, which is the length of the carrying-table, with the picaroon. Those who were employed with me, the fellow-servants, frequently got up on the carrying-table also. I couldn't say that all of them got up there frequently. I know that they got up there, but as to [139] how often, or anything like that, or which ones I saw up there—the only one I know I saw up there was Coffin. He got up there quite frequently. I would not say I heard Mr. Kelty tell him he should get up there. I did not tell him to get up. Coffin never asked me to get up. After I moved the lumber from this carrying-table, I put it up on the push-cart or lumber-cart.

As to the location of the push-carts, one would be as close over to the push-table there, on the east side of the push-table, and one on the east side of the loading platform F. It would stand in there. That is, the one stood in next and close up to the push-table, and the other stood just far enough away to leave a passage between the two for the workmen.

Q. In your deposition, you speak of a horse in connection with those push-tables. That was a wooden support, wasn't it, for the lumber?

A. There was a wooden support for one end of the

(Testimony of H. C. McCann.)

push-cart, to hold up that end, being it only had a bearing of two wheels, and it would be going all over. These push-carts consist of a frame and axle and two wheels. The push-carts were about two feet high. I didn't measure them. When I say they were two feet high, I mean about as near as I can remember two feet high to the top where we started to put the lumber on. Practically that is not two feet up to the axle. The axle, as near as I remember, was about a foot. The wheels were, in my opinion, about two feet in diameter. The wheels were not narrow; they had a broad rim on them, and were in width, four or five inches, something in that neighborhood. There was a [140] steel band on them and steel spokes. I think the hub was flush with the surface of the band. As to the cross-pieces of the frame extending out five or six inches beyond the general frame, I couldn't remember. I know they extended out flush with the rim of the wheels. As to whether they extended over that or not, it wasn't very much if they extended over at all.

We piled these carts or trucks up reasonably high with lumber, something about in the neighborhood of sometimes four feet high on one of them. At times I mounted this push-table from those cars or trucks. I don't know exactly why I did not mount from one of those trucks on the day I received the injury unless, if I remember rightly, there was a truck there, a load so high if I once got upon it I would either tip down one end and dump off all the load, or pull half the load off on me if I jumped to get up

(Testimony of H. C. McCann.)

on top. That is a kind of a recollection or impression, I suppose.

Q. You don't recognize any difference between the two. Do you recollect, as a fact, do you recall, looking back to the 30th of July, 1907, have you a picture in your mind of that truck piled so high with lumber that you were afraid of it falling if you would get on top of it?

A. No, I haven't it in sight. I would not say that was a fact. I do recall there was a truck there. I believe I looked at the truck before I started to get up. My back was turned toward the truck, and I was facing the carrying-table at the time the jam started on the push-table. My attention was called to that jam for the reason that we were continually on the lookout for lumber, for a jam being taken up of that kind, and there had not been any lumber for a short spell there, and I [141] was looking out, looking around for any jams or what was stopping it. I don't recall that Mr. Coffin called my attention to the fact that there was a jam up there. I don't recall that he said anything to me about it. It is not a fact, and I don't recall that he asked me to get up on the table here and stop and remove, or relieve such jam. I do not know whether he spoke to me at all at that time. Mr. Coffin helped me at the time of the accident to remove my foot from the spike-roller. That is the man who was working with me. As to whether he was standing along side of me at the time I started to remove that jam, I couldn't say his position. He was there on the platform. That is, he

(Testimony of *H. C. McCann.*)

was down on the platform F. I don't think he was nearer the push-table than I, at the time. I was near the platform; I was nearer the push-table. I recall that I was nearer the push-table than Coffin. He was then standing some place to my left, to the east of me, and maybe northeast or something like that. The stream of lumber ceased then for a short time, and that is what called my attention to the fact that there was a jam upon the push-table. I was continually on the lookout at any time for any jam like that; even when the lumber was coming, we had to keep looking out for some stoppage that would come like that. That was not particularly the first that attracted my attention to the fact that something was wrong,—that the constant stream of lumber had ceased. We were continually on the lookout for it.

Q. I want to get at the fact whether you turned around and saw it or whether the lumber had ceased coming?

A. I turned around, saw the boards, yes, while I was standing on the platform. [142]

The board that came down was lodged across, having one end in this side part of the frame, which is higher than the roller, and came across this frame and was in here.

Q. In between these two?

A. Not in between here. It had a bearing on the roller and this roller continually turning, held it up in there tighter. It continued over the roller, in under the skid marked G on the model. The pair of skids were further this way. They were not all in pairs,

(Testimony of H. C. McCann.)

maybe one at the end in pairs, and then three or four together, and so on; they were not uniform. The skid under which the piece of lumber was caught on that occasion was, I would say, about seven or eight feet from the north roller. Between the south skid and the one on the side was six feet. (Using model for illustration.) I stood up on the platform F at some place about in that corner, and turned around and saw this, by turning around and raising upon my toes, I saw this board which was lodged in there, and turned around and stepped upon this small platform between the push-table and the carrying-table, stepping from there upon the carrying-table, and from the carrying-table I stepped on to the roller, on to the platform. I was in the act of stepping over there, and the next thing I knew, my foot was caught and pulled in between the [143] roller and the board, and the roller coming down, chewed up my foot. I couldn't say whether I was up on the push-table or not, when I was caught. It was in the process of trying to get up on it. This board, which I have testified of being laid on the push-table, was lying flat on the push-table, and I could stand here and see it lying flat upon the push-table. (Indicating.) There is not a roller here; this is an endless chain, a chain made up of different parts, links of steel, which has a raised part such as that. (Indicating.) This is a carrying-table. It is not a roller—it is a chain. This chain moves here; it carries the lumber sideways.

Q. How far up in the end of this chain is the end

(Testimony of H. C. McCann.)

of the carrying-table?

A. It is around the neighborhood of eight or ten inches around, I guess.

It would not be dangerous if you would step on this chain. There is no danger in that other than that carrying you sideways, carrying your foot out from under you, because these lock together; there is no boards or anything can get under between them; they are handled with small blocks, and when they come up, they lay flat. It is about a foot from there to there. Between the chains. It was about ten inches or a foot.

I can't say whether my foot caught in there as I went up or whether I stepped clear up and my foot slipped back in again. It was all done so quick I can't form any opinion. The whole transaction only occupied a very few seconds. As to which side of this moving chain I stood on when I started to mount, as a rule I kept right upon this edge along here. As a rule, I stepped upon the edge. I didn't observe the technical part of the way Mr. Coffin got up. He went up that way, while [144] the machinery was moving. When I started to get up, I think the carrying-table was absolutely free of lumber. There was no lumber coming down. I did not speak to anybody before I started up. I didn't tell anybody I was going to go up. I did not make any effort to stop the mill before I started up. I had been up there many, many times before. Practically always went up the same way. I believe I had mounted the push-table while this continuous process

(Testimony of H. C. McCann.)

of moving the lumber was going on. There was danger of having your feet knocked from under you by the timber that was coming down, if you jumped up in that way. I don't think I appreciated that fact at that time. I knew that roller was revolving. As near as I can remember, the roller made about a hundred revolutions a minute. I never gave any thought to whether or not if I put my foot in there it would knock the teeth of the roller out.

Q. You knew that, you didn't have to think of it.

A. I didn't try it.

Q. There are some things you don't have to think about; didn't you know, without stopping to think, if you got your foot in there that it would not hurt the roller?

A. I know it now. I didn't stop to think about it then. I suppose I knew it. Most likely I knew if I got my foot in there it would be injured. I don't see how you can expect me to state that I knew if I got my foot in there I would be badly injured, at least would be injured, when I never gave it a thought at the time. I suppose I ought to know it if that is what you mean. I knew the board X in the model was there. I never attempted to put my foot on that board by stepping on the carrying-table on the board and then over.

When I have given the distance as two feet from the [145] carrying-table to the push-table, I mean that portion of the push-table right to the edge of the roller. The diameter of the roller is six inches. The space between the board marked X and the extreme

(Testimony of H. C. McCann.)

south end of the platform or push-table is about nine inches. In order to land safely upon the platform and not be in danger of getting my foot in the roller, I had to clear that roller entirely. And it extended out about an inch above the surface of the platform. I had to step two feet up and two feet and at least nine inches, in order to clear it. I didn't estimate whether that would make a step of about three feet; it is simply a long quick step from about two and one half feet, I think I said, something like that.

(Referring to the photograph.) I knew what the piece of lumber or timber that stands upward from the platform known as the push-table was. It was a piece of pipe. It was an iron pipe. That was there the time of this accident. I don't know how far from that iron pipe the boards letter A on the photograph are. I would judge the distance about a foot, a little less, maybe. In mounting the push-table I didn't mount from the carrying-table up over the push-table, instead of going up over that wooden roller, using that as a hand-hold to carry me up, because there is nothing there to step on. That is a foot, that stands out about a foot, but the board is up edgewise. There is nothing to hold the board there, and this revolving shaft is there. It comes down to that roller; it is revolving the dog-roller, and the plank is on the inside of the dog-roller. I never tried it. I don't know whether I could or not. There was no hopes of it; there is nothing to hold up anybody that would stand on it. As near as I can remember, the size of that [146] timber was one

(Testimony of H. C. McCann.)

inch. I have a good recollection of it; it was one-inch frame up all around the lower side of this shaft. It was a piece of lumber one inch thick. I couldn't say as to how wide it was. I never put it to the test to find out whether it was securely nailed to the frame. It was nailed.

Upon stipulation of the parties, the Court directs the jury to inspect the premises under charge of the bailiff, an officer of this Court, and the Court appoints Mr. Dillard as the person proper to point out the changes and answer such questions as the jury may put to him, concerning the mill, the attorneys for each side to accompany. [147]

Cross-examination of the Plaintiff Continued.
(By Mr. WRIGHT.)

I visited the scene of this accident on Saturday with the jury and the rest of you. I would say the distance at the time of the accident, between the carrier lettered B on the model and the outer edge of the push-table letter A, was about two feet.

Q. I will ask the question again. I want the distance, as near as you can state it, from the extreme edge of the carrying-table next to the push-table, to the edge of the push-table, next to the carrying-table, and over the dog-roller.

A. "And over"; I didn't understand that part. About a foot and nine inches. The elevation of the surface of the push-table above the carrying-table was two feet. It has been lowered about a foot. On the 30th, when I attempted to mount the push-table over the roller, before doing so I did not hear anyone

(Testimony of H. C. McCann.)

speak at all. I received no directions. It was the fore part of the two weeks before that when Mr. Kelty ordered me up on the push-table. I had been working there about two weeks, and the first few days of those two weeks he gave me no orders. That was the only time I was ever ordered on the push-table. Mr. Kelty remained there until I had mounted the push-table. He did not tell me how to go up at that time. He did not tell me in what manner I should get up on the push-table. I got up on the carrying-table, and from there up over. I think some of the employees other than myself and Mr. Coffin went up that way, but as to which one I can't recall positively. I generally performed the service of clearing away the clogged lumber or jammed lumber up on the push-table. On this occasion when I was injured, I testified that I stood on my tiptoes down on the platform and was able to see it, that is, to see the piece of lumber caught between the two skids, and lying flat upon the push-table, and the [148] upper edge of the board was caught and rested against the easterly edge of the push-table. At that time there were two hand trucks on the platform. There was room between those so I could get back. I could not say positively why I did not go back upon the platform and attempt to relieve the jam on the platform. As a rule, we had that truck there; it was loaded with the log lumber. I could get back between the two trucks, but the lumber was so long it extended away over the end of the push-table. It extended clear beyond here. It did not extend clear up here; we

(Testimony of H. C. McCann.)

would have space enough in here to work. I am not positive if it extended beyond at that time. I have no definite recollection. I did not try to go back that way. I don't think I had any picaroon at all. I had one with which I generally worked. I had not done anything with it. I left it there at noon and when I returned it was gone. I left it some place about the machine, right around that vicinity. I would say that is my impression, because I would not leave it any certain place, but right there at the table. I had no place, when I quit work, where I left the picaroon before that. When I left for noon, the mill was closing down. During the noon hour the mill was not in operation. I returned that day before the mill was put in operation, about the time the whistle blew. I am not positive whether or not I asked anyone for the picaroon. The first thing I commenced was to look for it. I looked for it right around there on the table, around that platform there; around the carrying-table and the push-table. I don't think I had time to look anywhere else, if I remember right. They were closed down for noon for an hour. I had my luncheon there. [149] I was there during the hour it was closed down. I generally go away up on the other side of the mill to eat my luncheon, maybe on the bay side, or over in the yard, in the shade, or a cool place. I did not spend any portion of the hour around the mill, or around that portion of the mill where I was employed. When I came back the picaroon was missing. I don't believe I asked anybody where it was.

(Testimony of H. C. McCann.)

I am not positive of that fact. Before this time I had never stopped the mill in order to clean off or clear away the lumber jammed on the push-table; but I have stopped the trimmer. When I stopped the trimmer, the stream of lumber which I have described ceased to come down on the skids over the push-table on to the carrying-table. The stopping of the trimmer stops the lumber coming; it does not stop the machinery at all. I did not make any effort on the 30th, when I saw this jam, to stop this trimmer. I had stopped it before. I didn't stop it on that occasion because every time we stopped it accumulated the lumber on the trimmer and made it harder for the trimmer, so it was always our effort to keep our part going without interfering with the other man's work. When I saw the jam on the push-table on the 30th, the reason I did not stop the trimmer was because I knew it would cause an accumulation of lumber on the trimmer, and I thought about that and took the other means. I went ahead to clear it out. Generally we had time to clear it out before any jam comes from the trimmer.

Q. As soon as your attention was called to this jam, you turned around and saw the lumber buggy or hand truck was so piled up with lumber that you were afraid to get on top of it [150] and also then you stopped and thought about the trimmer, that you did not want to cause an accumulation of lumber there, and having those things in consideration, you jumped on to the dog-roller?

A. I don't say I thought of all of them. All this

(Testimony of H. C. McCann.)

would take time. It had become a habit of not stopping the trimmer unless we just had to. I don't know as I actually saw the lumber buggy or that it was piled up with lumber, and noticed it there. I did not state positive that it was so piled with lumber that I was afraid the lumber might fall off. I said, "If I remember rightly it was that high." I think I remember correctly about that. My best impression and best judgment now is that it was so piled up, and that is the reason I did not attempt to get up in that way, and I was afraid that I would be injured if I attempted to get up on that lumber by the falling off of the lumber.

Q. You knew that if the lumber did fall off with you on top of it that you were likely to get hurt?

A. I don't know as I gave so much thought to that as to the fact that the lumber would fall off, and that was all there was to it. I don't know as I knew at that time that if it did fall off I was likely to get hurt. I don't think I appreciated the fact that if that lumber fell off with me on top of it, I was likely to be thrown down on the ground and be hurt. If I had any occasion to think of it, I most likely would appreciate the fact that if the lumber fell on top of me I would get hurt, but I never gave any thought to anything like that particularly.

Q. You appreciated if you put your hand in that revolving [151] dog-roller, it would get torn and get hurt, did you not?

A. I never gave any thought to that either. If I had thought, most likely I would have known it. I

(Testimony of H. C. McCann.)

never had any occasion to think of it.

Q. You had occasion to go up over this revolving dog-roller, didn't you have occasion to think of it then?

A. I didn't see any occasion at all. The time Mr. Kelty told me first to get up there, it did not occur to me that I might get hurt, and it never occurred to me that in making that leap up about three feet that I might slip and fall on the dog-roller. That never occurred to me. It never occurred to me that in getting up there, if a piece of lumber came down and struck my foot, it might cause me to fall down and my foot go into the spike-roller. I know the dog-roller was revolving. I knew it had teeth in it.

Q. You knew if anybody put their foot or hand in there, it would be injured, didn't you?

A. No, I never gave any thought to it. I certainly fell many times during my life. I suppose I have slipped and fell. I don't know that I was much more likely to slip and fall working in and about a machine such as I have here, and jumping from a narrow edge than I was from the level ground, upon a smooth surface. I really couldn't say that. I would be a little more careful in working around a machine such as this than I would if I were walking out on the sidewalk, but the chances are that if you slipped, you would fall much quicker on the sidewalk, not expecting anything to happen. You handled that work different than what you would on the street. I don't say as I realized I was more likely to get [152] hurt here than I would if I were playing

(Testimony of H. C. McCann.)

baseball, for instance. I appreciate the fact now that I was more likely to get hurt here than I would if I were walking on the road, but I don't know as I did then. I never had any thought of it in any way, shape or form. I thought it was possible to get hurt in various places, but I never gave any thought to any particular place or anything.

I had not sustained any accidents in or around the mill of any kind before. I had not had any accident that I would consider serious prior to that time. I had had accidents before. I didn't think anything about whether any man was immune against accidents; no matter where they are, there is no insurance against accidents.

No employees of the Benson Lumber Company at any time had ever given me any caution about mounting the carrying-table or push-table. No one connected with the mill had ever warned me, either directly or indirectly. I had never heard any employee working with me warn me against getting on the push-table or carrying-table. Mr. Coffin or Kelty never said anything to me about getting up on those tables. They never cautioned me, that is what I took the question to be. I was able, where I was, to call up to the operator in charge of the trimmer, but not to make him hear. From the position in which I was at work on that day on the platform I would not be able to get in communication with him; I never did communicate with him from there. I did not know of anyone communicating with him from there, not from where he worked. I could see the operator

(Testimony of H. C. McCann.)

of the trimmer from the carrying-table. I could not say whether I could see him from this intermediate platform between the push-table and the [153] carrying-table. I have gotten up there. I do not know what this board which was immediately in front of the spike-roller was for. I was informed afterwards that it was there for the purpose of avoiding getting your clothes in the teeth of that roller when you got up on the platform, but I never knew it at the time. I couldn't say what this platform was for, that is, the platform between the carrying-table and the push-table. I did not frequently get on that with my picaroon in order to get a better reach over the carrying-table from the push-table. I don't think I ever did see anybody get right up on that table.

I said that all the lumber that was delivered on the carrying-table was taken off by myself and my co-laborers and laid on these carts. I couldn't say what kind of lumber was being loaded on those carts the day on which I was injured, it was mixed lumber; that is, lumber of various lengths and various widths. I couldn't say positive that some of it was 12-inch boards, but I should think it was; and some of them narrow pieces, simply as it came from the saw. As it came we piled it up on these push-carts. The lumber, in being loaded in that way, might act as a binder and prevent the load from falling off, if it would get mixed up in such a manner. I have seen part of a load of lumber fall off of one of those carts. I couldn't say positive how often. It could

(Testimony of H. C. McCann.)

happen in various ways. One end of the truck going down and hitting the floor, that would raise up part of the lumber. I said we had a horse under one end of it, but you can't get that horse under it while you are wheeling it along. It is always under it when we are loading. If it happened to be loaded too heavy on [154] one end, it would fall down when it was standing still, and part of it fall off. I cannot recall positively how high the lumber was on the carts at the time of the accident. There was lumber on both carts at that time. We loaded them according to the different grades and different sizes of lumber, we loaded in that way.

Q. Now, in your direct examination, you stated, if I recall correctly, that on one previous occasion you signalled the trimmer, and had him stop the trimmer. Do you remember when that was?

A. I am not positive. It was not just once, maybe several times during the two weeks. I signalled to him by getting up on the carrier-table and throwing a block over to him. When I got up on the carrying-table, I am not positive as to right where I would stand on the carrying-table. I would simply get up on there. Sometimes we had to stand on the end of it, but I don't know as it was to call his attention. We had to work along over that table. On this previous occasion, I stood on the carrying-table and signaled to the trimmer to stop. I did that by throwing a block of wood at him. I signaled him to stop because the lumber was in such condition there that I couldn't get it clear otherwise unless he did stop.

(Testimony of H. C. McCann.)

I knew by previous experience that I couldn't clear it. I had to use my own judgment about that. I didn't signal to him in the same way on the 30th because a board like that, a single board, could be generally got out. Just a single board there and I thought I could get it out easily.

I have been working with the water company for the last two months or so—the water department of the city. I can't [155] say it was permanent. It is just temporary, as far as I know. I am receiving two dollars and fifty cents a day. That was the same wages I was receiving at the Benson Sawmill. Prior to accepting employment from the water department of the city of San Diego, I worked for about a month, I think it was, for my uncles at house-moving. At present my duties in the water department are working about the yard, cleaning up pipe and painting it. That is the yard out in the park, at 11th and Beech, I think it is. I am working at cleaning up pipe; I have to roll the pipe. Maybe I have to lift it a little bit, light pipe. I testified Saturday that my weight was now about 170, around there, and at the time of the injury it was 140, something in that neighborhood. So I have increased in weight since the accident around in the neighborhood of thirty pounds. I don't have any difficulty in rolling that pipe about. My duties as a house-mover were general work, helping around. I was not handling horses. I should say I was just working around, working with the auto truck at times. I did not run the auto truck. I worked at house-moving

(Testimony of H. C. McCann.)

in the neighborhood of a month. I received \$2.50 a day. I didn't have any steady employment for some time before that. I worked wherever I could, at different places. I worked at different jobs. The last previous job that I had before I worked at house-moving, I think was working as a helper for a boiler-maker down at the Mission Brewery when that was under construction. I worked there about five weeks, I think it was. I received \$2.50 a day. At times I would find difficulty in doing that work. I quit there because I didn't happen to belong to the union, in that case. That is what my employers told me. That is the [156] excuse the employers gave me when I quit. I quit the work of house-moving because it was too heavy for me. So later on I got a job in the water department. I can't think what I did before I worked as assistant boiler-maker. I can't recall what the next job was before that. I might work a day here and a day there so many places. The first job I had after I recovered from the accident, I was running an elevator in the Union Building. I think I received ten dollars a week for working for the Union. I worked there about ten months or eight months, something like that. I didn't quit there, I got let out. My next job was soliciting tourists for an automobile company. I did that around in the neighborhood of six or nine months, something like that. I quit there because the company were out of business.

Q. You were driving an auto, weren't you, and had a collision with a railroad train, which put the

(Testimony of H. C. McCann.)

company out of business; isn't that correct?

A. I couldn't say as to that, what it was; it might have been that, and might not have. It is a fact that I was driving an auto and went in front of a car on the Pacific beach road and had a collision which wrecked the car and injured the people I was driving. What I received from the tourist company varied, from \$1.50 a day. I got a sort of a commission. I have had other jobs than those I have mentioned. I was running a hoist at the big hotel being constructed, now the Cecil hotel, and the Savoy theatre. That was a hoist for hoisting building material up from the ground to the workmen. I sat down the entire time during that labor. I started in, I think, at \$2.25 a day and had a raise to \$2.50. I don't [157] believe I had a steady job until I got up to the brewery since then. I said in my direct examination that I had been studying with a correspondence school. I have been taking the general illustrating course, for the purpose of equipping myself for some usefulness in life. I have been qualifying myself for general illustrating. I have not practically finished my course. I couldn't say how long it will require me to finish it; it depends on myself, how much time I can get to study. Of late I have not been able to study at all. When I am working all day and am tired when I get home at night. My hours with the city are from 7:30 to 4:30, eight hours, and I am so tired and weary at the end of the day's labor that I cannot resume my study. I don't know the exact date when I began this course. It

(Testimony of H. C. McCann.)

was of my own selection that I began this course. I have no difficulty to contend with other than just the time, and the expense attached to it, of course. Outside of that, as far as I know, I am perfectly competent to master the course. I passed my examination so far satisfactorily. It would be rather hard for me to estimate how long it would take me to finish that course if I devoted my time exclusively to it. The course is divided into studies. You have to accomplish so much. I don't know anything about semesters or college work. I couldn't say what I would be able to earn when I have completed that course and would be successful in getting a job; it depends entirely on one's self. Persons proficient in that line get as high as any position, and I have heard it runs away up, and it is low. It varies. I couldn't say what the range of the compensation is. In some cases the cartoonist along that [158] line might receive a compensation as high as \$45 a week.

I do not know why I was discharged from the San Diego Union when I was running the elevator.

When I went up on this push-table, I would not say the lumber was coming down in a stream. The mill was running just the same. It was sawing and the trimmer working. There was nothing to stop it from coming down at the various times you would get upon the push-table. Pretty good-sized sticks come down there. At the time of the accident, the incline of these skids was greater than at the present time, and they came down rather swiftly. There was a bumper over here to keep them from going clear

(Testimony of H. C. McCann.)

off. I didn't realize so much at the time what it was for. I don't say I actually knew at the time what it was for. I knew what the push-table was for, simply to carry the lumber back into position again. I knew what the carrier-table was for. I knew that the lumber came down with considerable force. I knew it bumped up against this bumper out here, to keep it from falling off the push-table. I suppose I did know that if I got on there I would be likely to be hit by the large pieces, and knocked off my feet. I suppose I thought about it most likely.

Q. The trouble was, you didn't do much thinking in those days?

A. I was not much inclined to do much more work at that time than I had to. But I was rather fond of hopping about and showing my ability. That was not the reason I jumped up there to show them how athletic I was. I suppose I was quick and I wanted to make headway in the work, so I could work up into the mill. I never put it to any test [159] whether I could jump further or leap further than the average boy.

Q. How is it you happen to remember so distinctly the measurements of the push-table and the carrying-table and the different ways, and the appliances about the mill and did not particularly take notice of them at the time of the accident or prior thereto?

A. I just took what you would call a rough look at them and noticed the different ones. I was able to tell the exact measurements of those various ap-

(Testimony of H. C. McCann.)

pliances. I knew that the push-table came up about just a little above my eyes. I remember all those things. I remember that push-table, for instance, came up this height, and the length of it was by the trimmer, being it was measured off in two foot-lengths between each chain, each pair of chains, rather. I never made any measurements of the mill and its different appurtenances before these changes were made. I remember now what those measurements were, what the distances were. I knew them approximately at the time. I took no thought at that time to the exact measurements. I never stopped to think whether it was dangerous to step up there or not. I never had any occasion, I guess, to have me stop and think. I never gave any thought to whether there was any danger to get up on the carrying-table or push-table.

These skids extended clear out along the carrying-table, not quite to the end, though, and these big boards came clear down on the carrying-table, sometimes clear of the push-table, the various lengths. I had to watch out for them to see that they did not strike my foot when I got up to that carrying-table.

I couldn't say that I was a boy of a little more than average intelligence. Naturally I thought I esteemed myself [160] a boy above the average. If I had had occasion to stop and think I would have known and appreciated that there was danger.

Redirect Examination.

(By Mr. HAINES.)

This accident occurred something over six years

(Testimony of H. C. McCann.)

ago. I have not been going to school since then. I couldn't say why. I had not the means to go to any school. I could go maybe to a public school and then throw all my responsibility, as you might say, I would be on my parents to keep me. I had my own way to make.

That plank X is not there now. The mill runs without it. I noticed a change made in the skids since the time I was hurt. Just the iron or steel cleat, that is a band, a protection on the top of it where the lumber comes down and hits it. They are longer, because the table has been moved out and lowered. The push-table was moved out three feet, I believe it is. Before and at the time the accident occurred, there were no iron strips on top of the skids. By looking at the photograph annexed to my deposition, I observe that the skids have been gouged or worn out. The lumber moving on these skids had the tendency to wear them out. I testified in answer to Mr. Wright that since the accident this carrying-table has been extended, and there is another set of skids leading from the carrying-table of the size it was then, down to the extension of the carrying-table. The loading is done out in the yard alongside this extension. It is not any longer done from this platform. I know that there is still a man working on the platform F. He keeps those jams [161] cleared out there, that lumber. That is his business. The four men of his that were there had to do all the work of the loading of the lumber and the keeping of the jams cleared, before and at the time of this

(Testimony of H. C. McCann.)

accident. Now one man attends to that. He does not do any loading of the lumber. At the time this accident occurred, this roller shaft was running, about a hundred revolutions a minute, as near as I can recollect. In order to get up there from a push-cart, you would have to get up over that working shaft. This push-table was lowered about a foot since the accident. This platform between the tables was boarded over. If the extension of the carrying-table was not under construction at that time, it had just been practically completed, it had not been in use yet. It was under construction sometime during the two weeks that I was working, but it had not been actually installed and in operation. As far as I knew, it was a part of the plan of the mill. The platform between the carrying and the push-table was boarded over. And if any of the other men had occasion to get up on to the carrying-table, they would step up on the little table and the carrying-platform, and then on the other table.

My ambition was to work into a better position in the mill. I considered then the work would be extremely hard. From the time in the morning, maybe 15 or 20 minutes, or maybe half an hour after that time, my clothes were not dry,—you might say soaked through with sweat, from that time on. The reason I did most of this work was that I had orders to get up there, and then I was, as you might say, ambitious to do [162] the work and make a showing, you might say, so I would be in favor and be promoted.

(Testimony of H. C. McCann.)

As to my health, I haven't the same health I had before the accident, by far, and as to getting about, I haven't that—I lack that walking, carrying me over on to the left foot, all that spring has to be done from the hip, you might say, and I don't know whether it is from that cause, or what it is, but I have trouble with my back in that portion, and I can't carry anything heavy, being I lack that ability to throw myself over from the other foot, to walk, and it is so unreliable, I can't rely on the foot whatever. Sometimes I will be at work and one will break, and I will have to quit work and lay off one week or two weeks until I can fix it up. At times there is very much tenderness. It is very sensitive in parts, and at times it gets very sore from being upon it.

I have been trying to get a correspondence school training.

If this plank had been taken out as it is now, as near as I can say, my foot would not have been caught in that way, it could not have been. It was actually caught between the roller and this plank.

About this picaroon, I said something in my deposition about providing myself with one. The picaroons which the company provided ran in the neighborhood of three and a half feet, or maybe four feet, in length. I provided myself with one with a handle on it about five feet long. I made it longer so I could work more easily on the platform, make the work that much easier. [163]

This table was about five feet and seven inches,

(Testimony of H. C. McCann.)

as I have testified. It would be like trying to go fishing to stand on this platform and reach over with that picaroon and dislodge this board as it was there, you couldn't really say you could do the work, it would be just a chance that it would take some hold on it. These picaroons just have one claw. I had to lay the picaroon aside when carrying lumber and pick them up when occasion arose for reaching lumber on the carrying-table, or whatever use I could make of it. I think this picaroon of my own was a better instrument than the one the company furnished and that is the one that was gone when I got back at noon. I am not positive about whether they use those picaroons out on the rafts; they used most every kind of a tool out there that there was. I do not believe that I ever saw my picaroon after that noon, that is, so I would know it; there are several down there now of the same size, about the same size, but I could not say it was the one I had.

Recross-examination.

(By Mr. WRIGHT.)

I said a few moments ago, in response to a question asked by my counsel, Judge Haines, that I went up there because I had been ordered to go up that way, the order that I have heretofore testified to being given by Mr. Kelty. That is the only order I ever received about going up there.

I could not move that plank with a picaroon, I would have to get clear around, when you stick them in you got to push on them, and the more you pull on it the tighter [164] they go in. I did not try

(Testimony of H. C. McCann.)

to remove it at that time. Being the roller was working entirely against it, the only way I could have removed it would be to get out and shove it back.

Q. You rather liked to get up there so as to show you were active, in order to get promoted?

A. We did not have any time to try anything down there; the work had to be done and had to be done quick.

I could not say whether it was customary when we quit work to put the picaroon between the carry-table and push-table. We were working with it there, we could not keep it in our hands when we were handling the lumber, and we would drop it the most convenient place. We had no regular system, whatever occurred to us right around in that vicinity; every man was his own boss in that regard and did what he pleased.

The revolving shaft was protected by a board on the under side, but not on top. That board might have been almost level with the shaft, or around in that vicinity. It did not come up even, or above the shaft any.

The joints here where the rolling shaft connected with these rollers were not protected by a casing, so that there was no danger of getting my foot into those.

I identified on the photograph a piece of iron pipe that extended up from the corner of the push-table and to the end of the roller. That was there at the time of the accident. It was about three-

(Testimony of H. C. McCann.)

quarter inch pipe, something like that.

Q. Was it solid, put in securely? [165]

A. There was a hole in there and it was down in that hole. I never took hold of that pipe when I got up.

Q. Couldn't you easily have gone up on the push-table from the outside of the roller by putting your hands upon that pipe, could you not have stepped upon the projection there that covered this revolving shaft and gone up that way, without being in danger of getting your foot into the roller?

A. Well, being it is easy,—I didn't form any conclusion; I most likely didn't observe it at the time; that pipe did not extend up very high. The pipe extended up about two feet; I was two feet below here, so the pipe stood up at least four feet from the level where I was standing.

Q. And couldn't you reach up that way and spring up on the push-table without getting on the roller?

A. When I would get on the level, I would be holding on to a pipe down by my feet.

I could not give myself any assistance in that way.

My health is not as good now as it was. I have gained some thirty pounds. It is all according to whether I am able to eat three good square meals a day. I am able to eat. At times food tastes good to me; it is according to what it is; I am not very particular.

As near as I know my circulation is good.

Q. There is nothing very seriously the matter with you now outside of the loss, which is very un-

(Testimony of H. C. McCann.)

fortunate, of your foot.

A. My stomach has never been in the same condition it was before. I could not say whether it is because I do not get exercise. It started to bother me from the time [166] of the accident. It never bothered me before; it only bothered me to keep it filled before, and that does not bother me now. It bothers me to be careful how much I do fill it.

Redirect Examination.

(By Mr. HAINES.)

No officer of the corporation, or foreman, told me when I wanted to get up there to take hold of this iron rod and step there and get up that way. I had no instructions at all from anybody how to get up.

Cross-examination.

(By Mr. WRIGHT.)

No, I never saw other employees mounting over these push-carts. I never saw anybody get up any other way. [167]

Testimony of A. W. Diller [for Plaintiff].

A. W. DILLER, called, sworn and examined on behalf of plaintiff, testified as follows:

Direct Examination.

(By Mr. HAINES.)

My name is A. W. Diller. I live at 1714B Street, in this city. My occupation is carpenter and building. I made that model which has been used here to illustrate the testimony, at the request of Mr. Winders. He was the superintendent of the Benson Lumber Company. I believe he succeeded Mr.

(Testimony of A. W. Diller.)

Evenson. I think the model, a portion of it, is made on a scale of one inch to the foot. I have examined the mill since I made the model.

The guard-rail on the south side of the push-table A rises above the surface of the table perhaps an inch above the rolls or an inch and a quarter, something like that. I just worked at setting up this machinery for the lumber company. I am one of the carpenters who worked on it. I made the changes after this accident. The push-table was cut down or lowered about twelve inches and moved forward about three feet. The platform F was left as it was before it was moved forward. The skids originally were made of Oregon pine, from the trimmer down to the carrying and the push-table, the Oregon pine being either two or three by eight. Those skids were not topped with iron at that time. I was not right there at the time the accident occurred. I was not on the grounds that afternoon, but I knew about when the accident did occur; my attention was called to it. I was not engaged at that time in making any changes in this machinery. I was engaged in the construction of part of it; [168] if I remember right, I was at work on the east end. If I remember correctly, I was employed on the extension from that table, this carrying-table B, out east. I would judge that extension to be 125 or 130 feet long. It is the same thing as is there now. The original plans of the work contemplated this lengthened carrying-table. This original plan contemplated that the lumber should be taken along

(Testimony of A. W. Diller.)

the north side of the table as it came out on these chains to be drawn off and placed on carts.

Q. You mean at the time that the accident occurred, but I mean afterwards, where was the lumber loaded, taken off and loaded on the cars?

A. It is loaded from these chains that extend east.

Q. That long carrying-table?

A. At present here.

At the time the accident occurred the lumber was loaded here on this platform called F. I do not remember the exact number of men that were used in working on this platform before these changes were made, four or five though, but I do not remember. These men saw to releasing any jams of lumber that occurred as it came from the trimmer.

If I remember correctly, I made this model about two years ago. When I made the model this plank was not parallel to the dog-roller in the mill; I put this in the model because it was there at the time the accident occurred. I tore out that plank, or else the men working with me tore it out, I do not remember. Mr. Evenson ordered us to take it out,—I think it was the Monday morning perhaps after the accident. [169]

Cross-examination.

(By Mr. WRIGHT.)

I took some measurements at the time I constructed this model of the push-table and carrying-table, of the different distances. It is practically on a scale of one inch to the foot, I think, as nearly as I could make it, but I do not remember whether it all

(Testimony of A. W. Diller.)

scaled to one foot to the inch.

The guard-board in front of the dog-roller was not there at the time I made this model. However, I was familiar with its position at the time of the accident. It is perhaps an inch lower on the model than the position it occupied then.

Mr. WRIGHT.—I have designated this as the guard-board; I do not know whether that is the proper name for it or not. He said it was there at the time of the accident, but it was taken away, and that it is probably represented an inch lower in the model than it was at the time of the accident.

(Witness continuing:) The exact measurements of this model, of the distance from the edge of the roll nearest the edge of the carrying-table, to the edge of the carrying-table would represent about a foot, I think. The distance from the edge of the carrying-table to the guard-board on a direct line is two feet. The height of the edge of the guard-board above the carrying-table would measure about [170] 21 inches. The guard-board was nearly an inch higher; that would make it 22 inches. I think it was a little above the center of the roll. The diameter of the roll, I believe, is 6 inches. The edge of the guard-board was three inches lower than the top of the roll.

The spikes varied from $\frac{3}{8}$ to $\frac{3}{4}$ of an inch.

Measured from the edge of the guard-board or the edge of the carrying-table to the extreme edge of the push-table it is almost three feet. It is about three feet from the edge of the carrying-table to a point

(Testimony of A. W. Diller.)

immediately over the roller on the edge of the push-table.

I was at work in and about the mill after the accident I expect a year.

This diagram was not made after the changes had taken place. The model was made before that was moved out. I do not remember whether it was made before the push-table was lowered. I helped to lower the push-table.

There was an intervening platform between the main platform marked F on this model and the carrying-table, marked B. I think that platform was there at the time of the accident. I thought you had reference to the platform between the carrying-table and the push-table. I think there was a slight step on the platform marked F. It was used to make it more convenient to get up that way. If I remember correctly, it was there at the time of the accident.

Redirect Examination.

(By Mr. HAINES.)

This platform between the carrying-table and the push-table [171] is as it is now and there was a small step leading from F up on to that, which was for the purpose of facilitating getting up on to it.

Cross-examination.

(By Mr. WRIGHT.)

I worked for the Benson Lumber Company at the sawmill subsequent to the accident for more than a year. I have worked for them recently. I quit be-

(Testimony of A. W. Diller.)

cause I got through with the work they had for me. Yes, I guess I was discharged.

Mr. Wright makes his opening statement to the jury. [172]

Testimony of T. C. Kilty [for Defendant].

T. C. KILTY, called, sworn and examined on behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. WRIGHT.)

My name is T. C. Kilty. I live at 3760 Olive Street, in this city. I have been here for nearly ten years. I was away about the beginning of this trial, in the northern part of the State, about 100 miles north of Sacramento. I own property there, and came from there down here.

During July, 1907, I was outside foreman for the Benson Lumber Company. I am acquainted, and was at that time, acquainted with the plaintiff in this case, H. C. McCann. I was with the company there before they started, and I think they started in May; the first run lasted until about the middle of June, and then we started up again, soon after the 4th of July, I guess perhaps the next day.

There is always an inside foreman for all mills, and I was general foreman for the Benson Lumber Company at that time and as such foreman I had charge of the men working outside of the mill, and working about the carrying-table and push-table and rolling platform. I employed the men who were thus engaged. I employed Mr. McCann, the plain-

(Testimony of T. C. Kilty.)

tiff in this case. I assigned his duties to him and told him where to work and what work to do. He was one of four men to take the lumber as it came from the mill and delivered on the carrying-table there, as it has been named, to load it on the trucks. I told him that was what he was to do. Three other men were employed with him; Mr. Coffin, and a man named Smith, and a Greek that I cannot just name. [173] I was with these men where they were working a considerable portion of the time. McCann had been at work on that loading platform from, I think July 5th; he had been at work there in the neighborhood of two weeks. He did not have any implements to put the lumber on the trucks with; all that is required is the hands. He received the lumber on the carrying-table there to put it on the trucks. I call it the receiving-table; that is where he took the lumber off and put it on these buggies. He did not have to reach for the lumber that was required to go on the trucks; he only had to reach for short pieces that might get on the table one way or another at the back end; he did not have to reach for any lumber to put on the trucks. We provided him with a picaroon to reach those short pieces. I think I instructed him in the use of the picaroon; think I showed him; brought it up there after the mill had run a day or two perhaps,—I discovered that it was necessary, that it was one of the things we must have, and I had one made and brought up there; they knew, of course, the use it would be put to. I saw them using it; I used it myself, used it for them.

(Testimony of T. C. Kilty.)

There were four men working on that loading platform; they should have worked in pairs to do effective work. I think Mr. McCann worked with Mr. Coffin,—in fact, all of the time he worked there on what we call the outside car, that is the one that is farthest away from the push-table. The four of them had to stand in that space right there; two tended the inside truck and two the outside truck; usually, and at all times, all of the lumber might be over one truck, and they would have to take it, just all worked together. [174]

Coffin and McCann generally worked in pairs. With regard to working next to or farthest from the push-table, they had to work to the best advantage. I think they did that; they arranged that themselves. The lumber came down there; it might all belong on one truck and they would have to do the best they could to get it out. When I first employed McCann I assigned him to this particular work. I think he asked for that job. When the mill had the first run, he was doing the same work, only instead of that he picked it off of the platform; it came down on the platform. I rather think I gave him about a week's work after the mill shut down, and during the time it was shut down he was there and he asked if he could have his job back again; I am quite sure he asked that question. He applied to me for the job.

I have seen Mr. McCann here in the courtroom, upon the witness-stand. As to his size now as compared with his size then, I think he is pretty much

(Testimony of T. C. Kilty.)

the same. I cannot see any difference. I would not notice any difference in his size. I did not know his age at that time. I did not ask him how old he was and he did not tell me. I noticed he was able to do the work. I observed him at the first job he done there, when I took charge of the outside, that he was well able to do the work, as well as the other men. He did not have to make any representations to me about his ability to work, he showed that he was able to do his part of the work at the first run. He was equally active with the other men that were employed at the same place; he was very smart. [175] He had no recommendations when he came to me for the job; we did not require any recommendations; he never told me that he had worked elsewhere for I never asked him. I do not know as it occurred to me what his weight was at that time; he was an ordinary young man; I would judge him to be about 140 pounds; I had no occasion to think about it at that time; I only knew he was able to do the work. I did not form any judgment as to his age at that time.

I have been around lumber all my life; I began work in the lumber business when I was 15 years old, and I have worked around sawmills ever since, you might say, until I came to California, and I worked here nearly two years; I worked here for nearly a year after this accident, as foreman until I got my leg broken down there and I gave up the position. I worked there since; I had charge of the platform. I am not now employed in any capacity

(Testimony of T. C. Kilty.)

by the Benson Lumber Company; have not been for over a year, and am not interested in it in any way whatever. I went back after my leg was broken but had to quit. Mr. Evenson was manager and sent me back to my position, but I found I could not do the work, as my position required walking constantly and my leg swelled up, my left leg, so I had to give it up, then, soon after that, I went back and took charge of the platform, then the shipping. I do not refer to this loading platform; it was the main platform where they load cars; I attended to the loading of all of the lumber that went out on cars.

There have been some changes made in the mill since I was there.

Q. What changes have been made since the accident?

A. Everything is the same except where the double [176] skids appear there, there was only one skid; I think it was made that way though originally, and we only wanted one skid, just a single skid; there was just a single skid instead of double skids there; we found that was a fault and had them taken out right away.

The testimony which I have heard about the lowering of this push-table is correct; I imagine it was lowered about 12 or 13 inches; the principal reason why these changes were made was that they increased the capacity of the mill about that time; they had to have more room; they saw about one third more lumber now than they used to. The carrying-table has not been changed; all that work was there

(Testimony of T. C. Kilty.)

then when the young man got hurt.

Prior to that accident I had never seen anyone mount the push-table from the carrying-table and over the dog-roller. I never saw the plaintiff in this case go from the carrying-table over the dog-roller up on to the push-table. I gave the plaintiff instructions as to where he was to perform his work and where he was to stay while working.

Q. Just indicate on this model here where you told him to stay.

A. He was—these men had this space, the truck would stop about here and the extreme end of the lumber would stop here, so it would not interfere with their passing in here, so that the lumber would extend over here in this way, so this place was never,—one truck would stand in here as close as we could put it without interfering with the running of the truck when it was loaded, and the other would stand on this side of the platform, and I discovered soon after the [177] mill started the way to prevent these jams you have heard so much about was to keep this table clear, if this table was not just clear, it would throw back, and it would keep on until it would touch up here, so that was one of the reasons why these jams occurred which you have heard tell about, by not having this table clear, and quite frequently, in fact every time I would come up there the first few days, I would find this young man here (Mr. McCann) up on this table. I called him down immediately, told him this little platform at the side of the push-table was his place. That was my duty,

(Testimony of T. C. Kilty.)

because I had to have this platform clear in order to keep the mill running, and as I said I discovered this was the cause, or the principal cause, of these jams, not having this platform clear. The boards that came down over the skids were all lengths, many of them were long boards. Sometimes a board passing down these skids and over on to the push-table and carrying-table would be of sufficient length that one end was on the carrying-table when another portion of it was on the push-table; the length capacity was thirty-two feet of the whole thing. The lumber and boards were of various lengths. You know the trimmer might have to cut a piece out of the center; he might have to trim the wane,—the wane is bark that comes in the lumber, in the log,—so he might have to take a chunk right out of the center of say two feet in order to make this lumber merchantable lumber, make it into what we call merchantable lumber, and of course a big piece would fall on here, and the other piece on here, and these skids extend here the same as there. At first, I told McCann a couple of times a day, maybe more than that, to come down here on the platform by the push-table and stay here. I presume that [178] I told him oftener than that. He seemd to be up there on the carrying-table every time, when I would come up at this particular place he would be up on this platform, and there would be a jam there, because it required the men to work in pairs in order to do effective work, they could not do it otherwise. I never saw any of the workmen whose duty it was to remove the lum-

(Testimony of T. C. Kilty.)

ber from the carrying-table and load it on to these trucks mount the push-table over the roller. They could not possibly be expected to do a thing like that; this lumber was coming down here, and there was no reason for any man to do that; there was no plan of work that called for that kind of a movement.

I did not superintend the construction of the push-table and the carrying-table. I was not a millwright there; I only placed it in use. I know the guard-board marked "X" on the model is a section there; it is just a common section of what we call a live roll.

I never at any time, during the employment of Mr. McCann ordered him or directed him to mount the push-table. I never ordered any of those men—I did not have to order them, because they learned very early there it was their duty to take that lumber.

The workmen generally mounted the platform by two trucks on the inside. The only time a truck was not there was [179] in the process of moving a loaded truck and replacing it with an empty truck. There generally were two trucks, one on the inside. We replace them both at the same time; they came in for loading; the loading crew generally done this replacing.

I had general supervision over the loading of these trucks as well as the work at the carrying-table. The height to which they were generally loaded depended on how fast the lumber came, and if we had cars to load them into quickly, and a great many

(Testimony of T. C. Kilty.)

things, they would go from two feet to three feet high; that is, from 1,500 to 2,000 feet on a truck, 1,500 feet would be an ordinary load. The height would not make them fall off; it was the faulty loading that would make them fall off. The height would not cut any figure; you can load it as high as you please and not have it slide. We had two trucks there; the first trucks we used, I am not quite sure if we had any of the new trucks there at that time or not; they had about 40 inches of loading space, I think.

I have gone on top of this push-table. I got up on the lumber and got up from behind sometimes, but most of the time I got up on the cars, also on the buggies, to get on top of this push-table. Mr. McCann got upon the lumber to get up there; he could not get up any other way, only on this lumber buggy. I think Mr. Coffin had been working there from the very start—I would not be sure about it. I kind of think he was right there from the start. I know there was not any platform there; that post was not there; those posts were not there. All this portion of the machinery was outside of the main building. The trimmer was inside. The push-table and carrying-table and loading platform were just outside the wall of the [180] mill. The carrying-table and push-table and platform had only been constructed and in use about two weeks. We put a shade over that very soon; I would not say it was there then, but I decided they had to have some shade there, but I would not say how many days—I would

(Testimony of T. C. Kilty.)

not say yes or no to the question as to whether there was any cover or shade over that at that time; we put it there afterwards, after the mill started, I know that. The boxing of the shaft which revolved the rollers on the outside had guards on. I did not notice particularly whether there was a big plank that extended also as a guard on the outside of the roller—there is so much machinery; but I rather think it was covered, though.

The board shown in the photograph attached to plaintiff's deposition extending the entire length of the push-table just outside of the casing is part of the frame. It extended far enough above the rollers to prevent the lumber from throwing over. That shaft there shows the boxing; it shows the shaft there, and each one of these is the boxing that runs the live rollers. The boxing is protected from accident, and there is a bevel here on each set of rollers there, and each one of those is a bevel gear, each one here has a large gear, perhaps about six inches that runs these live rollers; these rollers are continually going, as these gentlemen saw them when they were down there; these are covered with a casing, and this roller might have been covered. It might have been covered sidewise. I would not have taken any particular notice of it. [181]

I have been employed in and about sawmills since I was fifteen years old, and am familiar with the construction and operation of sawmills generally. I ran one for four years myself. It is customary to have push-tables and carrying-tables and loading

(Testimony of T. C. Kilty.)

platforms such as constructed here, in sawmills. The handling of lumber in the Benson sawmills is one of various plans, like any other; it depends upon where the lumber wants to be delivered. The push-table and the carrying-table at the Benson sawmill are constructed as push-tables and carrying-tables usually are constructed. The push-table is just that there. That cannot be constructed any other way. That is always the way of a push-table. It would not be a push-table if it were constructed in any other way; that is what it means; that is what it is; it is the change of the course of the lumber, that is what a push-table is. There would not be any way of covering up or protecting that dog-roller or spike-roller so that a person could safely go up from the carrying-table on to the push-table. If you did cover it up or protect it, the lumber would not strike it at all. The lumber could not strike the spike-roller, and the spike-roller is put there to prevent the lumber from sliding back when it tips. It was there, so that when it tipped and struck the other table, that it would not slide back. That is what a push-table was, to take it until it was clear of the roller. The guard-board which is indicated by the letter X on the model—that is, that board which extended about half-way up to the roller and between the board and the roller where the boy got his foot caught, broke first in the center and hung there in two pieces for quite awhile, and then it was pulled [182] off. I don't know who pulled it off, I wouldn't wonder if one of those men pulled it off

(Testimony of T. C. Kilty.)

that was there. It might be a couple of weeks or three weeks after this accident that it broke. I don't remember the exact time. It broke from the lumber falling on it and wore out and broke the board. I remember quite well it broke in the center and hung in two pieces, hung at each end for quite a while. There were not any boards placed back on it after that; that is, not while I was there. I stayed more than a year after this accident happened. The accident happened in July, and I had my leg broke the following December, and I worked there until,—after I got better, I worked there until the following November or December. That would be a year afterwards.

I have seen Mr. McCann, the plaintiff in this case, on top of the push-table. He got up on the lumber wagon to get up there. He got up there to release a board that was wrong there, or fouled in some way. It got fouled on the push-table. The usual and customary way of getting on that push-table, if it became necessary to get up there, was to get up on the lumber, on those buggies. They sometimes get rid of a board from the hind end here; there was a step there that was used sometimes in the early part of the—so you could touch a board and all you had to do was to shake it up and it would start off, and sometimes a board would get under the board that was to go, a chip or inch piece and stop it there from resting on the rollers. I couldn't say that I ever did see the trimmer stopped to clear away a jam on the push-table. It would be a good thing to

(Testimony of T. C. Kilty.)

do it. I couldn't say I did see it stop for the purpose of clearing the push-table. I testified [183] I never ordered Mr. McCann to get up there, but on several occasions I told him to get down off the carrying-table and keep in his place, which was on the platform. The reason I didn't tell him not to mount the push-table from the carrying-table was I didn't think—the roller was there right in plain sight, in broad daylight, and pretty good notice I thought for a man to keep away from it, and that fact for him to stay in his place was all I wanted, to stay in his place and do his work. I employed the other men engaged in and about the loading platform. They had not all been to work there about the same length of time. There was some changes made there. I couldn't say that all of the four or five men who were at work upon the loading platform were employed about the same length of time. Mr. Coffin was there, I know, all the time, and I think there were some changes made there. Those same men had not necessarily all been employed on this portion of the mill, which had been operating for about two weeks. I don't think this man,—I can't call his name,—I don't think he was there all the time. I know Mr. Coffin was there all the time and Mr. McCann was there all the time. Mr. Coffin was one of the original men.

This push-table became clogged or jammed up with lumber, you might say like an accident occurred; you couldn't tell when it was going to happen, and it might run a whole day and not run half

(Testimony of T. C. Kilty.)

a day. It might occur two or three times in half a day. It was just simply a kind of a mismove of some of the lumber. It was not on every occasion that there was a jam there that it become necessary to get upon that push-table and relieve the jam; if you gave that a pull or [184] a push you might start it off. Frequently that was all that was necessary to move it. The end of it might be against something and the other end under a board and throw that end out and change the course. In the performance of my duties I was in and about the yards of the mill and in where this platform was and around the carrying-table many times in the day, my duty was general oversight over the work, and to keep the mill clear and keep the lumber when it was piled, to see that it was loaded in the cars.

In performing the work about the loading platform McCann did all right; he was as good as any of the men and did his equal portion of the work. He was not as large a man as Mr. Coffin, but it did not require strength only but activity and to take hold of one end of the board and run ahead with it. He never complained that the work was too heavy for him. I had no favorites and there was no favoritism shown as to light work and he was not given any preference over any body else. I favored him some as a man in the pond wanted a man, and I sent him down to the man in the pond, as I thought he could do the work down there. It was a much better place for a young man and I thought this young man, being active, might learn to ride logs, and I

(Testimony of T. C. Kilty.)

sent him down there, that requires a man who can ride a log in the water; there are not very many of those men here. I put him down there as I thought the job would suit him; a man is better fitted in some places than others, but the man down on the lake wanted a man who could do the work right then; he didn't want a man who had to learn, so he sent him back.

I gave Mr. McCann the same instructions about his work [185] that I gave the other men; there were four men and they all had the same instructions; in fact, they knew their work and knew it like a book, and as far as I know it was the custom of all the men to get up on that push-table from these carts, and go around the end where I saw him get up. I never saw anyone connected with the work there mount over the roller from the carrying-table upon the push-table.

Cross-examination.

(By Mr. HAINES.)

I don't think I saw a man get up that way any time; if the mill was not running, the chances are I would not be there, and if the mill was not running they generally sat down. There would be no occasion for him to get up there when it was not running, unless it would be to clear away little pieces. The only occasion there was for getting on that push-table was when the mill was running.

I don't believe there is anybody that could tell about how many times during that two weeks that the machine was set up that the men had occasion

(Testimony of T. C. Kilty.)

to get up on the push-table. I didn't keep track of it. It would be a good many times.

I saw Mr. Coffin, and the young man upon that push-table and was up there myself. Also saw the scaler up there sometimes, the man that scaled the lumber, that tallied it; he would happen to come along there from some car and would punch it out. It wasn't anybody's regular business to get up there. When the thing was built it wasn't intended that anybody should get up there. The men did go up frequently as they found they had to because the lumber would go wrong, something would happen that would cause it to stop, and if they didn't get up there and [186] release these jams the lumber would eventually pile up so it would have to be taken off and loosened. Certainly, they had to remove those jams; I don't say they did not have to get up on that platform. I haven't said that; it was necessary to go up there on the push-table. I did not see them every time it was necessary to get up there; I was not there all of the time. It was the place of these four men to look after these jams. If that jam occurred or trouble occurred on the carrying-table, it wasn't anybody's duty to see to that; these four men had to take care of all the lumber that come down there to see that it was put on those trucks. They had this picaroon to work with to reach over if necessary. I should say the first one I made there was about four feet long. I believe Mr. McCann made one for himself, but I could not say whether he made it longer than the rest.

(Testimony of T. C. Kilty.)

The general location of one of these two-wheeled lumber carts was in next to the push-table, then a little space, then another one to the right of the push-table, looking north. I think the cart would track about three feet.

A man with a picaroon four feet long could not stand on the aisle between the two carts and reach over and do anything on this push-table; he could stand on the platform. He could not stand on this platform between these two carts and any lumber piled on and reach over and release any jam with his picaroon; he couldn't use the picaroon to release any jam; it was too high for that purpose; he would have to get up on something. I always thought it was about five feet. I was going to remark, it was about the height of my shoulder. I never had any occasion to measure it. I understood you had [187] the measurements here.

Q. Yes, we have it; five feet seven?

A. I never measured it, but I frequently stood there as I was going to remark, and leaned my shoulder against this roller, is what I said.

Q. Against that roller here. A. Yes.

Q. You would lean it against the roller?

A. Just about that height.

Q. Did you ever lean against that roller while it was revolving?

A. No, I am not as foolish as that.

Q. Now, then, if one of these four men was getting upon this push-table, he would have to go up over this revolving shaft, wouldn't he?

(Testimony of T. C. Kilty.)

A. He would have to go to get up there, I am not quite sure whether that shaft is covered or not, I am not certain about that.

Q. That shaft was there? A. Yes, sir.

Q. You saw it the other day, didn't you?

A. Yes, sir; it was there all right.

Q. And isn't it true that the shaft itself, on substantially or altogether its whole width is exposed now? A. Yes.

Q. Was it any different then?

A. I don't think it was. I think it is just the same as it was then.

Q. You would think it was dangerous to lean against or have your clothing come in contact with the revolving shaft?

A. You couldn't lean against it, but if a man was standing on the load of lumber on one of the carts, he could reach in and reach any part of the platform, if the cart was just right.

Q. And would not tilt with him? This was a sort of a tilting cart?

A. Yes, two-wheeled cart. It was loaded so the heavy part would be in front; it was always leaning down in front. We tried to keep it so we could tip it back easily, pretty near balanced, but the balance a little way from the front. I think they provided for a man getting on the back part of the cart, or it would tip down. I think we had a horse at both ends. I think we had something to keep it from tipping down, at least in front. [188]

I think this platform was about ten or twelve feet.

(Testimony of T. C. Kilty.)

I wouldn't say it wasn't ten feet; I would not dispute your word. These men had to do all the work of loading this lumber upon these carts, and it was their duty to see that the lumber was not jammed on the push-table, or the carrying-table. I saw the young man on the carrying-table at one time, and asked him to get down so he could clear the table,—keep that table clear. He was doing nothing there. I wanted him to get down and hustle up the work, get the tables clear. That was all that was necessary, to keep that lumber off the table; and that is all I said to him, to get down and get the lumber on the cars, and hustle this work. This platform which is here shown between the push-table and the carrying-table was never there, that I know of. I heard Mr. Dillard's testimony. I don't say that he is wrong. I don't say anything of the kind. This could not have been there. It was not there. There was a step clear across the whole platform there. They wanted to get it just to the right height. There is a step about 4 inches high from the lower platform. There was a lower platform; I should judge about 4 inches, I think it was about; it might be two planks, one plank on top of the other. From the loading-table up to this carrying-table was about three feet. They would put those planks there to adjust the lumber, so the lumber comes so they would have the full strength of their arm to pull it out, to get the right height, and I think they found out it was a little bit too low, and so they put on those two pieces to bring it just right and

(Testimony of T. C. Kilty.)

get hold of a piece of lumber and pick it up. This lengthened carrying-table was built at the same time, and it was not in use yet; we hadn't any use for it; you could put it either way. [189] I don't say that it was put there without intending to use it; it was put there to be used when the time came to put the lumber out in the yard. This carrying-table was a part of the original plan of the machinery, and when we got through filling the contract we had no use for that platform. That platform conformed to the main platform leading to the cars, and all the lumber at that time went on to the cars to the Russ Lumber & Mill Company; they took the entire output. It was built to load the lumber into the cars, and all of the lumber at that time went to the Russ Lumber and Mill Company and was loaded directly into the cars. We had not yet used the yards at all. The platform for the yards is also about three feet lower down than that platform. Ever since the Russ Lumber Company bill was filled that has been put into operation and has been used to the exclusion of this platform. It was a rather confined and congested place to handle all this lumber and at the same time to have the men keep watch of the push and carrying-table, but it answered the purpose.

There was considerable noise going on when the mill was in operation; you can't run a mill without a noise,—it is a necessary thing; there is a band-saw, trimming-saws and edging-saws, and the clatter of lumber all going on at the same time; the whole thing

(Testimony of T. C. Kilty.)

goes together in order to have it go at all.

The machinery in this mill was all new about the time this accident occurred; it had been there just about two weeks. It was no experiment; it had come from a plan; I think it was an Allison mill. It was an Allison mill and they don't ever experiment. The push-table and carrying-table features and the long carrying-table were preserved as features of the [190] first prepared plan. Those are the features of the plan that are permanent. I do not know what the man had in mind in moving this push-table out three feet. I know what I would move it out for. It was lowered in order to move it out so as to get more space inside.

Q. Then it was not in perfect working order at the time this accident occurred, was it?

A. Yes, sir; you don't mean to say that things don't improve? Things improve right along.

These skids were of wood, 2 by 6, and were not shod with iron at the time this accident occurred, and all sorts of lumber came down on them; some heavy lumber; all kinds of lumber—everything that comes from the mill. Naturally it very soon gouged out the surface of these skids and broke off the ends. It will wear. Looking at the photograph, those skids show wear. The irons were put on there to preserve them.

Q. That was all done after the accident?

A. The mill was more along and running, and naturally after it has run awhile you see where it would wear, would not want to have to put in those

(Testimony of T. C. Kilty.)

skids every week or month. Those are double skids; we had them taken out and made single skids. I don't think any of them were broken out during the operation of the mill; they would not hardly wear out in two weeks.

Q. Everybody about the mill was unfamiliar with the operation of this machinery during that two weeks more or less, were they not?

A. Unfamiliar with the sawmill?

Q. No, with the operation of these push-tables and the carrying-table?

A. They were new there. [191] The push-table was removed eastward some three feet and lowered a foot; in lowering it that increased the capacity of the mill and they wanted more space for the lumber to come before it would strike the table, so one piece would get out of the way of the other. They increased the capacity of the mill about the time they made the change there. I do not know when that was. The mill commenced running in the first place in May of that year, I think. It was in May, whatever the year was. Before this push-table was put in the boy was employed there, and at that time the lumber was delivered from the trimmer down on to this same platform, and he worked there. The mill shut down for about two weeks.

Q. And put in the mill while the boy's labor was suspended, wasn't it?

A. Not during all the time; I think during the last week.

Q. And during that time the new machinery was

(Testimony of T. C. Kilty.)

put in? A. Yes, sir.

Q. And he went to work with these among the machinery?

A. Yes, sir.

I didn't see why there was any danger to any employee from this dog-roller; it was visible to them as to myself; it was stationary, and worked at the rate of about 150 revolutions a minute.

The plank X had no connection with the pushing of the lumber. It had no utility whatever in handling the lumber.

I was not there when this accident occurred; I was somewhere out in the yard,—I suppose, around the works; I came there just as they were carrying him to the blacksmith-shop, or into the office. I didn't see any indications of where the accident [192] occurred by looking at the dog-roller and the plank in front of it, for I didn't examine it. This plank remained there for some time afterwards, until it was broken out accidentally. It was broken before. It was only broken once, and then after it was broken it was taken out.

I could not hear Mr. Dillard's testimony; I am just giving my testimony. I am sure that that remained there until it was broken out by the operation of the mill; we had no purpose in taking it out whatever; it was broken out, that I know positively. It was broken in two parts, and hung right down like that. It was not broken any time during the two weeks I was first employed there, that I know of. It was not put back because we had no use for it.

(Testimony of T. C. Kilty.)

When I employed this boy I did not take him and point out the possible dangers of this machinery; I showed him his place and started him, instructed him what to do, the same as all the rest of the men. I never said anything about the jams at all to any of those men about that push-table. They knew their job was to release those jams, if there was any. Every man around the place knows their job. The boy knew that, too. I did not instruct him at all as to how he ought to go up on the push-table; I just told him where his place was to work, that is what I told him. I didn't tell him that I expected him to work at releasing these jams when it occurred; I didn't happen to tell him that duty; I didn't tell that to any man there. They knew it was part of their job; they were there to take all the lumber that came from the mill; they were to take it off of the platform and it was their work to see it came on the platform. They knew that; I didn't have to [193] tell them that particular thing that way. They knew if it was necessary to do so in their judgment they must get up on to the push-table; they knew their job and they knew they had to take all the lumber that came from the mill. I didn't tell them how to get up on the push-table; I didn't speak about the push-table at all; I never had to give them that particular instruction; I gave them no instructions about the push-table. I would think I was insulting a man to tell him to watch out for this revolving shaft if they got up over it; you didn't have to tell them that.

(Testimony of T. C. Kilty.)

Q. In other words, you expected the boy to have the judgment of a man?

A. He was one of the men, he was not a boy. In my judgment he was as good as any of those four men there. I didn't know how old he was; I know since. When I put him to work all the instructions I gave was to see that the lumber was loaded from that platform on to the trucks.

I saw some of the men up here releasing jams. I believe I saw McCann up there; I could not say how often; it may have been once.

Q. Do you know how he got up there, when you saw him?

A. If I saw him up on the table, perhaps I would know how he got up there. If I saw him in the act of getting up, I suppose I would not. I think I did see him once in the act of getting up on the push-cars.

I don't know how many times I saw him; we didn't count those things because we didn't expect we would be called on to answer these questions.

It depends on what you call frequent as to the attention [194] required in releasing these jams; it might be once in the forenoon, and it might be twice; it might be more and it might not be any at all. This was irregularly the case during those two weeks that he worked with this push-table.

Mr. Evenson was the general manager; he had an office there on the ground.

The boy seemed to be ambitious to do his work and I considered him a good, willing worker.

(Testimony of T. C. Kilty.)

Q. Did you notice whether he was up oftener releasing these jams than the other men?

A. He was up on the other table oftener. I wouldn't say about the push-table, but he was up on this receiving-table, or carrying-table.

I don't think that I saw anybody but him and Mr. Coffin up on the push-table. I wouldn't say that I ever saw Smith, and it might be possible that I saw Smith. He was a young man. Mr. Coffin was the principal man, I think, that went up there.

The scaler was scaling lumber and went into the car, right at the car. He was waiting for the car to be loaded, and if he got through he would be up there before they were finished, and he would be there, and his car there, and frequently I would have to call his crew to clear the table. It was not any part of his job to take care of the push-table. It was very often, though, that he would be called to clear the table away, to clear away this jam, to help clean off this table, the receiving-table, so he would be there on an occasion of that kind. The work was not so heavy that it got ahead of these four men sometimes; it was because there was a jam there and it would have to be cleared off to keep it running smoothly. [195] I do not recollect any instance or reason why it should stop the mill, nothing so serious as that. A jam is just a glut of lumber; it is just a pile of lumber that got away from them; they couldn't handle it as fast as it came out while they were changing cars; it was not a jam, but a glut; the glut always occurred on the carrying-

(Testimony of T. C. Kilty.)

table; there was never any glut on the other table; there could not be there, because if it did not push off immediately it was because it was stuck and that particular piece has got to be moved. If a particular piece of lumber stuck up there and you would leave it there, it would certainly interfere with the operation of the push-table, and would have to be attended to right away, and a man with a picaroon such as I have described could not reach over between these tables up toward the upper end, the north end of the push-table. I guess there seemed to have been a choice here how to get up, whether to get up on to this push-table over the cart or some other way; that is one way you could do it.

Redirect Examination.

(By Mr. WRIGHT.)

It was possible to mount on the top of those lumber buggies and reach from the top of them with a picaroon on to the push-table. If you could lift yourself so you could see over there or reach the thing, a man would have no power with his picaroon reaching over in that way, on a level; he would not have to go more than two feet to control things up there.

There were no set-screws or anything in that revolving shaft by which one could get his clothes caught; it was smooth between each gear; each beveled gear and the gears were all protected, and there was nothing on this revolving shaft that [196] could catch a man's clothes and wind him about but

(Testimony of T. C. Kilty.)

the short shaft, and that was perfectly smooth. At the time of this accident on July 30th, 1907, the loading platform extended clear out to the railroad.

Q. Then it has been sawed off or shortened?

A. There has been a roadway cut through there.

Q. And at that time the carts were loaded and pushed clear out to the railroad track. How far is that?

A. Perhaps a hundred feet. That is a hundred feet from where it was loaded out to the railroad track, and at that time everything was delivered to the Russ Lumber Company above culls. We were not storing any lumber in the yard, and for that reason we were not using the carrying-table to project it on out.

Q. I believe you said these changes were made on account of the increased capacity of the mill?

A. That is what I should say they were made for, that is, the changes were made while I was away from there. I think I heard testimony that the changes were made two or three years ago. They were not made within two years after the accident. This is an Allison mill; they are one of oldest sawmills in the country, and this push-table and carrying-table is part of the general plan of the Allison mill, and that would be the general plan for it if the lumber had to be delivered out straight ahead, that would be different, but that is the Allison plan.

Speaking now of this accident, about that time I think they all got the same wages, \$2.50 a day. I don't think Mr. Coffin got any more then, but it was

(Testimony of T. C. Kilty.)

afterwards. He was the [197] leader of those four men.

A jam or a glut of lumber occurred only on the carrying-table, and whenever a piece caught in the push-table I don't refer to that as a jam or glut.

We had two sizes of truck; I am not sure whether we used any of the new trucks in loading lumber; we had two sizes; the first truck we used there I think they tracked about three feet, and they would extend a foot on each side, that would make them about, the extreme width, about maybe four feet. The trucks we had were those low trucks, and I ain't quite sure whether we had our new trucks in at that time or not; would not testify as to that. I was only speaking of the old trucks.

Q. For the purpose of refreshing your memory, I will hand the witness an invoice. For the purpose of refreshing your memory I hand you an invoice of twenty-five special lumber buggies, bought June 14th, 1907, paid June 25th, 1907, and ask you if those are the extra trucks you got about that time.

A. Yes, those were the trucks we got. We were using both kinds; yes. I think we were using both the smaller and the new trucks at the time of the accident on the platform; I would not say that we were not using both kinds. The smaller truck which we had before we bought the new invoice had iron wheels. There was a first frame of perhaps four by eight extending up above those iron wheels. Just the axles were placed under those pieces and then on top of those cross ways were four by fours. The

(Testimony of T. C. Kilty.)

top or level of the cart was elevated about six inches above the wheels. [198]

Q. What did you say was the height of those carts, these cross-pieces from the platform, without any lumber on them at all, I mean now?

A. I would say the wheels, I think the wheels were about, if that would make them twelve inches center, and then if the sides were four by eight, that would be eight inches on top of the center.

The surface of the cart, without any lumber on it, even the low carts, was about two feet and a half. The wheel was say two feet and the cross-pieces was about on so as to clear the wheel and that was a four by four, that would be two feet and a half about. The height we generally loaded those cars of lumber would vary. We come along there, and if the loading-crew was ready to take it, if they saw a chance to remove the load, they would take it. If it was perhaps two feet above that, two feet of lumber on it. When those two carts were both upon the platform, there always was a space left between the two sufficient for a man to pass easily in and out, and notwithstanding the platform was somewhat congested, that space was always there, it had to be there; you couldn't do business without it. It was necessary for men to get in and out between the cars on the platform.

At the time of the accident we were delivering all of the sawed lumber, except the culls to the Russ Lumber and Mill Company; they had a contract for all the entire cut up to a certain time or period of

(Testimony of T. C. Kilty.)

that year; they took all the cuts; the entire mill run went to the Russ Lumber Company that year. They kept ordering certain lengths and widths, but not at first until later in the season, when they began to see that we could get out those special things.
[199]

Recross-examination.

(By Mr. HAINES.)

I would say that the height of these loads of lumber and these trucks varied; we will take from a thousand to fifteen hundred feet on a truck. You could take fifteen hundred to two thousand feet on the big trucks, you could put two thousand on them, and the chances are there were lots of loads were put out there with two thousand. It would depend on the length how high the car would be; you might have two thousand on there and not be as much as a thousand of the other lumber. Perhaps three feet is the highest I have known of those having been loaded. If it was three feet high, then the top of that load would be five feet six inches from the floor. I have seen lots of loads of lumber, a man pushing, he would push away up high; he would not have to bend down to push on that load of lumber. I never measured them.

Q. If a cart was as highly loaded as that it would be hard to get over it to get on the push-table?

A. That would be about as high as the push-table; that would only happen maybe once in a while. I am not saying that happened very often, or happened at all, but I never measured the loads, but that

(Testimony of T. C. Kilty.)

car carried some one to two thousand feet of lumber, that is what we done.

I never said anything about that I ever instructed my employees to climb up over those carts to get on to the push-tables. I said I never gave them any instructions about that climbing at all.

Redirect Examination.

(By Mr. WRIGHT.)

There were no arms or cross-pieces of the frame that [200] extended out beyond the wheel beyond the load of lumber several inches upon these lower or smaller carts; we only had a few of the small carts and they extended out over the frame; the lumber would go nearly to the outside.

Q. Isn't it a fact there was always left a place where a man could put his foot to step up on?

A. That would depend on the bed of the load of lumber. Sometimes you couldn't put a 10-inch board there, but would put a 4-inch board, so in making the bed, as you call it, that would depend on the width that would be left outside, it might be three or four inches and might be more.

Recross-examination.

(By Mr. HAINES.)

I think these larger trucks were about 42 inches wide where the lumber was piled, where we load the lumber, from outside to outside. The track of those few trucks was about an ordinary wagon track. I never measured them. We couldn't use two of those big trucks at one time on the platform. We

(Testimony of T. C. Kilty.)

used one. I am not very certain whether those were used at all at that time; I would not be positive as to that. We got the trucks in June. The first consignment was *no* small trucks, the small trucks were made right there. Those big ones were all the same, and we were using them, that is a sure thing, because we were anxious to use them; they rolled so much easier; we liked to use them, but we couldn't use two of them side by side on that platform. [201]

Testimony of Benjamin C. Coffin [for Defendant].

BENJAMIN C. COFFIN, called, sworn and examined on behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. WRIGHT.)

My initials are Benjamin C. Coffin. At the present time I am living in Minnesota, International Falls. It is right on the Canadian line. I work in Port Francis, Canada, and live in the United States. I think I went there three years ago this last—two years ago last June, I think, some time about that time. I have been there about two years. My business there is carpenter work. That is what I work at. I don't know how long I have been a carpenter. I have worked at the business off and on for twenty or thirty years, more or less. I once had the good fortune to live in San Diego. That was the first time I came here; I think it was in 1904, and the next time I believe it was the next year I came back. I was here in 1907. I then worked at various things around town here, and finally I wound up by work-

(Testimony of Benjamin C. Coffin.)

ing for the Benson Lumber Company. I know Mr. McCann, who sits at the end of the table. I have saw the gentleman, the boy. I have worked with him at the Benson Lumber Company. I was there in July, 1907, when Mr. McCann had the misfortune to get hurt. At that time I was working in the capacity of lumber sorter, or something like that,—I don't know what you would call it, taking care of the lumber there; I think I am a little bit familiar with the construction of the Benson sawmill. I recall very distinctly the location of the push-table and the carrying-table. I know what is termed the leading platform.

This is the end we worked at (illustrating from model.) [202] I was at work about there,—the center of the loading platform, lettered F; I should say two or three feet from the carrying-table. I don't know just how far,—far enough to handle the lumber over here. I had the same duties to perform there as the other men. Two of the men besides Mr. McCann here were Greeks, and didn't understand the English language very well, and didn't understand this work very well, so they had to be instructed, and I think one worked with McCann, as I remember it, and one worked with me, but at this time I think McCann and myself were working together, but these two men here had to be—the lumber had to be sorted and you had to put it on a truck here, and one here. When Mr. Kelty was not there, I myself had charge of those men. Mr. Kelty's position was that of yard foreman. When he was absent,

(Testimony of Benjamin C. Coffin.)

the understanding when I was put there to work was that I was to have charge of the men. Mr. Kelty gave me those instructions. I don't know whether the men knew that or not. They surely took my instructions. On the 30th of July when this accident occurred, I think Mr. McCann and I were working together. I am not sure of that, but I am certain I stood about two or three feet from this table when that occurred. I recall the accident on the 30th, in which the plaintiff, Mr. McCann, had his foot caught in the roller. As to where Mr. McCann was standing immediately preceding the accident, I don't know. He was on the lower platform, where we were working,—on the platform F, which we are designating as the loading platform. He was helping to take the lumber off the feeding table there, at that time.

As to what, unusual, attracted my attention at that time, we had been pushed pretty hard with the lumber, that is, [203] it had been coming pretty fast, and all at once I missed it on the receiving-table, and looked up and saw that the carrying-table, this other table here, was loaded with lumber and I hollered, I think, and I know I hollered to the trimmer to stop, but I don't know that he heard me, and McCann saw the lumber at the same time, or when I hollered, and he came around me and went in between there and got on the receiving-table there and went to jump on this table, this here. No time at all was occupied, hardly,—just as quick as you would think about it, almost. I did not order him to go up there. Mr. Kelty was not about at that time. I was in charge,

(Testimony of Benjamin C. Coffin.)

as much so as I was at all the time. It was part of my work. It was part of my work to look over the other men when Mr. Kelty was not there. And as soon as that jam occurred, I called out to the trimmer to stop that. I know that McCann started; he went after I hollered, I know that. I don't know whether he saw it at the same time I did, or how it happened, but I know he went after I hollered. I saw him leap from the carrying-table up over the—I didn't know that he was going to do that when he started out there. I never saw anybody get up that way before. I had been there perhaps for ten days or two weeks. I came a day or two, or two or three days after the new machinery was inaugurated. But from the time I commenced to work; I was there continuously all the time the mill was running. My place was always on the loading platform. I had never seen anybody get up that way. I don't know how his foot happened to get caught. It flashed in my mind, or I saw a piece of plank come down as he jumped, and I thought it struck his foot, and drove it down onto the spike-roller, that is what I thought [204] about it. As to the lumber coming down off the push-table when he jumped, it was miscellaneous. There was a board now and again. This jam had been caused by a 2 by 4 catching on one of the skids. Part of the jam was almost instantly released when he jumped up there. There were two parts of it. One was above the 2 by 4. That did not release, but the other part released and went on. It released itself. I couldn't say exactly where his foot was,

(Testimony of Benjamin C. Coffin.)

but it was between the roller and board marked X on the model, and I should say near the center of the roller. I couldn't say at all as to whether he attempted to alight upon the board marked X on the model, or attempted to clear the roller, and was caught by a board. After his foot was caught, the man that was doing the trimming of the lumber stopped the lumber from coming over. He could do that at any time. I saw the man, I knew he did stop because I hollered, but I hollered the second time. I hollered both before and after the boy caught his foot. Sure there is a good deal of noise made there by the machinery, by the band-saws, and that rumbling and crumbling of lumber. Occasionally we have called the trimmer and made him hear us, and other times he would not hear me, because of this jam, it was liable to occur sometimes once a day, and sometimes maybe less or maybe more.

Before McCann started to get up on the push-table, I had called to the trimmer to stop the lumber. He did not have to stop the mill in order to stop the lumber, because the mill is built in such a way, or was at that time, that he had to handle the lumber, to get it on to the trimmer, where the saw is, and those saws I believe, are four feet apart, I believe, no, they are two feet apart. He could cut a piece of lumber into any [205] length he wanted to. The operator had to put all the lumber from one table on to another one before he could come to the saw. I had never seen any one connected with the mill mount the platform indicated as the push-table, over

(Testimony of Benjamin C. Coffin.)

the roller. I have been up on that push-table myself. I went up generally over the truck. Sometimes there was a pile of lumber upon this part here. I went up over that. We had a ladder there, but it was not always used. I know we had a ladder, but it was not used. The pile of lumber was immediately behind this here delivery-table here. The platform known as the loading platform, and indicated by the letter F, is considerably above the ground. That pile of lumber was piled on the ground, and came clear to the top of the push-table. That was a pile of all kinds of miscellaneous pieces,—short pieces and big timbers and heavy timbers and all kinds of timbers dropped in there. I don't remember having seen McCann up on the push-table,—I might have seen him there. I don't recall it. I don't know that it was anybody's business particularly to get up there and release it. I was naturally the fellow to look at; it was naturally my business to look after it. I have been there quite often myself. Of course, I worked there a long time after McCann did. I continued to get up there. I went up there as I said,—just as I have indicated. That space was always there after this mill was made.

I have often seen McCann up on the carrying-table indicated with the letter B in the model. I never gave him orders to get up there. To me it was quite a dangerous place, and I told him several times that I was afraid he would get hurt there, that is about the way I worded it. I considered it [206] a dangerous place, and so it was considered by all of

(Testimony of Benjamin C. Coffin.)

them. I never told him not to get up there, but that I considered it dangerous; I never ordered him to come down off of the carrying-table; I have seen him up there and told him it was a dangerous place, as quite frequently there were very heavy timbers came down there, say eight by eight,—down those skids, and would shoot down on to that. I told him that was a dangerous place for him to be. He was supposed to know where his place to work was. I had no occasion to tell him not to get up this way. I never saw the boy try to do it before, nor anybody else.

Q. The reason you never told him or warned him against mounting on to the push-table from the carrying-table or by the spike-roller, sometimes called the dog-roller, is because you never saw him try to get up that way, and never saw anybody else try to get up that way?

A. No, sir, I never did, neither before nor afterwards. It was a dangerous place because there is skids all right clear out on beyond to that other table; it is not represented there at all, I do not think. The skids extended the entire length of the push-table and carrying-table, I think, and that timber comes down there very viciously; one of those 8 by 8 or six by six timbers, or anything like that, if it would hit a man, it would break his leg or smash his foot, the way I figured it out. I told McCann: "I am afraid you will get hurt there."

As to why I didn't tell him this was a dangerous place, that is, that mounting the push-table from

(Testimony of Benjamin C. Coffin.)

the carrying-table over this roller, was because I had no idea that anybody would try to get up there. McCann was a very active fellow, very active. He was the same size he is now, as far as I can see. I cannot see any difference. He did a man's work. He did as much [207] or more than the usual man under my control there. He was very active and agile. He hopped about quite lively. As to the instruments provided with which to reach over and get the pieces of lumber on the carrying-table: we had two picaroons, a short-handled one and a long-handled one; I think the short one was say three feet, or something like that, a three-foot handle, and the larger might have been five or six or even eight; it was very long, anyway. We had two of them at that time. I would not say whether McCann had been using the picaroon in the forenoon of the day on which he was hurt or not. I know he was not using a picaroon at the time he was hurt. The lumber buggies, or push-carts, were on the platform at that time. They were putting the lumber on to the push-cart. I think the lumber was about half loaded. I do not think they at that time were in such a condition that if a man tried to get up on them that the lumber would likely tumble off. There was not any necessity of McCann getting up on the carrying-table, lettered B, after I told him it was dangerous, because he could have went up over the cart, or could have went up behind, as I always went. I said that I had told him several times it was dangerous to go up on the carrying-

(Testimony of Benjamin C. Coffin.)

table. Sometimes his work required him to go up there, but by being careful and keeping on the outside, it would not be so dangerous, but he would generally have a position closer in than was necessary, I thought, and that is the reason I told him that. He would go in up close to these skids, up on the top here, so that when the lumber came down with the force you have described it would likely strike his legs. That is why I told him about this being dangerous there. [208]

Cross-examination.

(By Mr. HAINES.)

I didn't come down here from Minnesota in anybody's interest. I was asked to come here by somebody. I don't know whether it was the Benson Lumber Company or the insurance company brought me here.

Q. Now, do you recall the height of this push-table from the platform as it was at that time?

A. Just about waist high.

Q. How much? A. About waist high.

Q. Aren't you confounding it with the way it is now?

A. It was let down; this is the push-table A.

Q. How high was it at that time?

A. That part of it, you mean?

Q. Yes.

A. Oh, I should say that was 5 feet, or a little better.

There was occasion to go up there once in a while. The same sized timbers came down on that, as it did

(Testimony of Benjamin C. Coffin.)

on below—sometimes as big as 8 inches square, and then 4-inch planks, and 2-inch planks, and boards. As to my best recollection about how the mill worked the first two weeks we put the new machinery in, and whether jams often occur, or gluts, on top of this push-table: the first two weeks, the first week, I don't think I saw there but a few, while I was there the jams did not occur so often as they did afterwards, because the skids became worn afterwards. These heavy timbers coming down over these skids wore them, and sometimes they would lodge there. During the first two weeks, there was a skid broke out,—that is, it was not broken out, it got displaced, it moved to one side and slipped out. [209]

I had worked there about ten days; I did not commence when the machinery was first put in, as I stated before. I was there, I think, ten days or two weeks before the boy was hurt,—somewhere around there. I had not worked there before the machinery was put in. I think I commenced there; it runs in my mind now, about the 15th of July. This accident occurred on the 30th, and the machinery was then just as it is represented there, only that—it was put in just shortly before I went to work there. I had not worked before the machinery was put in. I know nothing about the conditions before the machinery was put in. I went to work after McCann did. I was considered his boss by Mr. McKilty and Evenson. Mr. McKilty hired him. I did not have power to discharge him. I was to

(Testimony of Benjamin C. Coffin.)

look after the work, that was I was placed there for. I was placed there to be the head of this gang of four men, and told that. Before I came there, I think McCann was acting as such. I am not certain about that.

I never saw it necessary to get up on top of this push-table, only this one time, during the time from the 15th of July until the accident occurred. That is the best of my memory. I have been up there,—but it was not necessary. I went up sometimes for various reasons, but most all of the times there would be a little piece of board, these rollers there, as represented, are not high enough to carry the lumber *if* a piece of inch board just under there it stops the whole thing. I did not say on my direct examination that it was quite a frequent thing for men to be on there while the mill was in operation. I said on the lower table. You may be mixed up; I am not. I could not say as to what I would go up there for; [210] sometimes I went up there to fix these skids; it was my place to fix those skids, or his place, McCann's. When he was the boss, before I was there, it was his place to fix them. That is what Evenson told me, to watch those skids, and keep them in their place. I do not remember of McCann's going up there to fix it. I did not say it was McCann's place to do it, after I was there. Several times I climbed up over some lumber piled on the north end here. The tide water was underneath there. As to how I would get on the lumber, it was piled on the ground, solid, high enough to

(Testimony of Benjamin C. Coffin.)

reach from the ground up nearly to the top of that. I would travel over this roller. That is, in that case, you would go over the roller on the north end. There is nothing dangerous about that roller, no spikes in it. And then, at other times, I would climb up on the car here and get over. I would not say how many times that was; it might be once a day, and it might not be more than once in two days. It might be two or three times in one-half day. I cannot say that I ever saw McCann go up there that way over the carts; I might have seen him go up; I cannot say. That is six years ago. I think my recollection is very clear about all the details that occurred there during the two weeks before he got hurt. We were pushed pretty heavily on the day that this accident occurred. It was pretty heavy work, anyway. When we had an 8 by 8, we would double, the four of us, on it, or more if we needed them. Ordinarily we four men were expected to take the whole output of the mill, and handle it. It was part of our work to keep the lumber moving on the push-table there, and on this narrower table. It was a very strenuous work, about as hard a work as I ever did. I think it was the hardest I ever did. If the mill [211] did happen to stop on account of filing the saw, or something of that sort, we worked ten hours. We commenced in the morning at seven o'clock and worked until twelve. And then commenced at one and worked until six. And this is the work we were doing at that time. I do not recall of the mill being stopped at any time to allow

(Testimony of Benjamin C. Coffin.)

the putting in of a skid or fixing it. The lumber used in the skids, as you have them represented there, I think was 4 by 8, or 12, I am not sure,—by 8, I think. I think 4 by 8, at that time it was either 3 by 8 or 4 by 8, I am not certain which. I know I made one of them and put it in myself. All sorts of lumber came down over those skids. Just before I saw McCann jump up on to the carrying-table, the day of the accident, I was standing about the middle of the—partially facing it, and this carrier here. Both of them, both of these tables, pretty nearly, so we could see both. There was a pretty heavy jam at that time. Part of it lay on this lower table and part of it on the skids, these two skids; I don't think there were two together, but the stick got in back here, a 2 by 4, I think it was, like that; this was already jammed with a little board, the way I remember it, down here, like that; when a board got on there these rollers would not have any effect on it to carry it, so this 2 by 4 got in like that, or a 2 by 6, I do not remember which it was, and it stood up endways, and this lumber had jammed here, and this came in up here and made a double jam on it.

When McCann jumped, he jumped on here. I do not know whether he hit a piece of lumber or what, but in jumping there he missed his foothold, or something; whether he went to jump on this piece or that piece I don't know; I remember this lumber down [212] over here, it loosened on and came on through here, and this back here remained

(Testimony of Benjamin C. Coffin.)

on; that is the way I seen it. I had shouted to the trimmer,—he was up in the mill about eighteen or twenty feet from me and down behind the trimmer's table, out of sight from here. I do not think he heard me the first time, but the second time he either heard me or McCann. McCann came from behind me up over this roll.

Q. And leaped up on to the table here?

A. Up on to the table, the way I saw it; if you want me to show, this is not exactly a fair representation of that thing as it was at that time; there was a post here, up there, an upright, and the way I saw him, he put his hand something like that, on here, and hops up on here, and then turns and faces that way.

Then he came right around in front of me. I was standing nearly in the middle of the platform, with my back towards the east and facing towards the middle.

Q. Looking in this direction? A. Yes.

Q. Towards the south?

A. Towards the west.

Q. Southwest? A. Yes, sir.

And McCann came up behind me, he had evidently noticed this jam, and he went around, but there was no lumber there at that time, that is why I came to notice this jump in the first place, and he jumped up from here and stepped over on to the north end of the carrying-table and then attempted to go up there. I don't know what his object was in going up [213] there, but suppose to release that. I

(Testimony of Benjamin C. Coffin.)

could not say what his object was. My impression there at the time, and now is, that a stick of lumber came and hit his foot. It was all done as quick as you can think, and he fell face down, and his foot was in the roll at that time, between the guard and spike and the roller; between this plank that was across in front of the roller and the roller was chewing away on his foot. When I took the boy's foot out of there and turned around, the trimmer stood there watching me. When I lifted the boy up I went right in between and took the boy's foot and pulled it out of there; I pulled him backwards and took him in my arms; I had to pull him back in order to get him. I did not pull him over the roller; he was lying face front on the roller and his foot in there, and of course I pulled him backward off of the roller, not over the roller,—pulled him to the south. I did not pull him over the roller; I lifted him off of the roller; I did not pull him over; I lifted the boy up. I stood in there, right at the corner when I lifted him; there was no platform there.

Q. Where were you standing?

A. I was standing here; there is room enough for a man to stand in here. I say there was three feet of a space there, as the way I remember it, about three feet, and I went here and took the boy in my arms, this way, first pulled his foot out, and took the boy and carried him out of there. I reached in this way around the boy.

I was standing in here in this three-foot space.

Q. Was there a platform on the same level with

(Testimony of Benjamin C. Coffin.)

the loading platform? [214]

A. You don't have to go in there; you can stand here and reach in; it is only about three feet wide; it is wider now.

There is nothing in there, no timbers.

I did not have to stand on this platform and reach over and hold up that boy five feet and seven inches. I pulled him back on this table. I did not pull him over the roller, I lifted him over; he knows how he got over the roller as well as I do. I did not stand on the carrying-table; as I have said two or three times, I stood down here and pulled the boy out this way. You could lift him over the roller without pulling him over the roller.

Shortly after the accident this plank in front of the roller was knocked out by myself; it runs in my mind that way. It was done at nobody's orders. I don't know how long after the accident, but I had no instructions to do it; I knocked it out because I considered it dangerous.

Redirect Examination.

(By Mr. WRIGHT.)

Q. Mr. Coffin, you testified in cross-examination that you came here from Canada at the expense of some parties; who was it that came to you and asked you to talk? A. Where?

Q. From Canada, or Northern Minnesota; do you know who that was? A. Just now—

Q. Just before you came out here.

A. Mr. McFarland.

Q. Had you ever seen him before? [215]

(Testimony of Benjamin C. Coffin.)

A. I suppose I have, but I would not swear to seeing him before; he is the county attorney there.

It was at his instance that I started. I arrived here Saturday morning, I believe,—Saturday of last week,—after this case had been started. I was directed to come direct to your office. I was not subpoenaed. I came of my own accord and of my own free will, that is, I had promised some lawyer,—I do not know who it was,—to come down here if they needed me, and I came according to promise. No one had told me what to testify to before coming here.

I talked with Mr. McCann, the plaintiff, about this accident, and that helped to fix the facts in my mind. I talked with him, I think, somewhere about two years and better ago. I talked it over with him shortly after the accident while he was at the hospital. I went up there and talked it over with him at his request.

Q. Did he want to solicit your services in trying to recover damages against the Benson Lumber Company?

A. Well, I suppose that would be the long and short of it. First, he wanted to know how it happened and all about it; I don't know what I told him how it happened; I told him if I had to go to trial, I would tell the truth as far as I saw it; I think he knew how it happened; I think I told him; I think we talked it over; am pretty sure we did. I do not remember whether I told Mr. McCann there as to how the accident occurred. I perhaps told him about

(Testimony of Benjamin C. Coffin.)

as I have told you here; I don't know just how I told him; he did not ask me if I had ordered him to go up on the push-table, and I don't think I told him then that I had told him to stay down off the carrying-table. I don't think we discussed the details, but I think I told his mother that I considered him reckless. I have talked with her about it. [216]

That shaft was protected with a boxing the full length of it, the whole length on the side and top too; I know that the top was covered at that time. I don't know how many times I told McCann it was dangerous to get up on the carrying-table; I know I told him; I considered he was a man; I thought he was a man grown. I did not know he was a boy; I had no more idea that he was a boy than I have now; he looked as much of a man as he does to-day and I thought he was a man.

When I lifted McCann off of the push-table this roller was not stopped. I took him off before the roller had stopped, and I lifted him over the roller so he could not get hurt.

If I am not mistaken, this was constructed so that there could be a platform, a small one, in here clear across, which elevated one a little above, on which to stand when working on the carrying-table. I am under the impression there was, that it was so we could put it on or take it off. I think it was there at that time, but am not certain about that; that was just a few inches above the platform.

Q. But you generally stood on that when you were working on the carrying-table?

(Testimony of Benjamin C. Coffin.)

A. No, there was nothing here at all.

Q. But you think there was a small one in there?

A. If I am not msitaken there was—it was arranged so we could put other plank in here and have a platform if we wanted to.

I would not say whether that was there at the time. I know Mr. McCann received no injury from being drawed back; I think he helped himself back. We worked together. I took his foot out, pulled it out this way, and I took him in my arms, and he helped himself. [217]

Recross-examination.

(By Mr. HAINES.)

I think there was probably a little platform between this push-table and this carrying-table; it was constructed so that we could have it there if we wanted it. I might have been in between the push-table and the carrying-table when I lifted the boy's foot out, or right at the corner; it is not necessary to be in there to help him, to take him out of there. By his helping himself, lowering himself down, I could take him in my arms and lift him up five feet and seven inches. I pulled his foot out. He did not climb over on to the table; he did not have to.

Q. You stood behind him and pulled him this way? A. I certainly did.

A. And the roller was in motion, of course.

Q. And in pinching him between you and another timber, it didn't hurt him? A. No.

Thereupon the defendant rested.

[Testimony of H. C. McCann for Plaintiff (Recalled in Rebuttal).]

H. C. McCANN, recalled in rebuttal, testifies as follows:

Direct Examination.

(By Mr. HAINES.)

Not to my knowledge was Mr. Coffin the boss of the gang there. I never took any orders from him; I do not recollect anything about him warning me about the carrying-table. When lumber was coming down on the carrying-table I did not go near the skids where it came down at the time it was coming, any more than it was necessary; not when it was sliding down on the skids. I never suffered any injury on the carrying-table. [218] The carrying-table was, I should judge, about three times as wide as the push-table, something or other like that. I never saw any pile of lumber on the north side; in fact, it was tide land down there; I noticed the tide there; we kept dumping trash in there to fill that up. From the push-table down to any ground or solid surface, or other surface, was, I judge, along in the neighborhood of about 15 feet high.

Cross-examination.

(By Mr. WRIGHT.)

I heard the testimony of Mr. Kilty and also of Mr. Coffin in regards to Mr. Coffin being in charge of the men when Mr. Kilty was away, and I cannot say they were mistaken. At the time I was there I never knew that Mr. Coffin was, had any charge

(Testimony of H. C. McCann.)

there any more than what I did, or any of the other men working there at the table. I did not think I was in charge. I know I was not in charge. Mr. Coffin never told me that it was dangerous to get up on that carrying-table. I could not say he is mistaken about that; he might have directed his speech to me, and I might not have heard him, something of the kind like that. I am sure that I have gone up frequently over that carrying-table and over that roller, many times before, and both Mr. Kilty and Mr. Coffin saw me do it.

Plaintiff rested. [219]

Exception No. I.

(Exception No. 1 is waived.)

Exception No. II.

Thereupon both sides rested, and the defendant then and there moved the said Court to direct the jury to return a verdict in favor of the said defendant upon the following grounds:

1. There was no evidence proving or tending to prove any negligence on the part of the defendant.

2. There was no evidence proving or tending to prove that negligence, if any, upon the part of the defendant contributed directly or proximately, or at all, to the injuries sustained by the plaintiff.

3. That it affirmatively appeared from the evidence that the plaintiff himself was guilty of negligence, that is, that said plaintiff did not exercise ordinary care or caution for his own safety and protection, and that the failure upon the part of the plaintiff to exercise ordinary care and caution for his own

safety and protection contributed directly and proximately to the injuries sustained by him.

4. It affirmatively appeared from the evidence that the injuries sustained by plaintiff were the result of a risk assumed by him in the usual course of his employment; that the dog or spike-roller was open, apparent and obvious and the danger of attempting to climb to the push-table or go to the push-table across said roller was an open and obvious risk of which plaintiff fully knew, comprehended and understood and appreciated, or should have, by the exercise of ordinary care on his part have fully known, comprehended and understood and appreciated. Plaintiff was not injured by reason of any concealed or latent danger, but was injured as a result of a danger which was [220] open and obvious and of which plaintiff fully knew and realized, comprehended and understood, or of which he should have fully known, realized, comprehended and understood had he exercised ordinary care for his own safety and protection.

Which said motion of the defendant was then and there denied, to which said ruling the defendant then and there duly excepted, and which the defendant here designates as Exception No. II.

Instructions.

Thereupon the Court, on its own motion, gave to the jury the following instructions:

I.

“Plaintiff sues to recover damages, laid in his complaint at \$25,485.00, for injuries alleged to have been occasioned by defendant’s negligence.”

II.

“The negligence charged in the complaint is, in substance, that defendant failed to provide a safe place for plaintiff to work and sufficient and safe appliances and other means by which his service was to be performed.”

III.

“The answer denies all the allegations of the complaint as to defendant’s negligence and plaintiff’s damages.

Besides these denials, the answer sets up as a separate defense, that whatever injuries plaintiff suffered were caused by his own carelessness. This carelessness, defendant contends, was plaintiff’s act in jumping from the carrying-table to the push-table over the spiked roller.

Said answer also sets up as a further separate defense that “the injuries sustained by the said plaintiff, if any, were a risk incident to the business in which he was [221] employed, and that prior to receiving such injuries the said plaintiff knew, or, by the exercise of ordinary care upon his part, should have known, of the danger incident to working in the position in which he was; and that said plaintiff fully understood, comprehended and appreciated, prior to receiving such injuries, the dangers incident to the use of the machinery, ways, appliances and structures mentioned in said complaint, and thereafter consented to use the same and continued in the use thereof.”

Exception No. III.

IV.

“The first issue to which the Court directs your

attention is: Was the defendant negligent?

The Court charges you, that negligence is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate human affairs would do, or doing something which a prudent or reasonable man would not do. The question whether or not there was negligence in a particular instance must be determined in the light of all the circumstances and conditions as shown in evidence at the time surrounding the person against whom the negligence is charged.

On this issue, the Court further instructs you that the mere happening of the accident raises no presumption that the defendant corporation was negligent, but the burden of proving negligence by a preponderance of evidence is upon the plaintiff, and the negligence, if any is proven, must be that alleged in the complaint, and, unless such negligence is so proven, your verdict must be for the defendant.”
[222]

To the giving of which instruction the defendant, then and there, in open court, by its counsel, duly excepted, and specially excepted on the ground that there was no evidence proving, or tending to prove, that defendant was guilty of any negligence whatever, or guilty of any negligence, if any, which contributed directly or proximately to the injuries sustained by plaintiff. Which said exception defendant designates as Exception No. III. [223]

Exception No. IV.

V.

“The Court instructs you, that an employer is not

to be held as guaranteeing or insuring the absolute safety of the employee, or the place in which he is to work, but it is the duty of the employer to exercise reasonable care in providing and maintaining a safe place for the employee to work and sufficient and safe material, appliances and other means, by which the service is to be performed. Furthermore, this duty of the employer to exercise reasonable care in providing a safe place, appliances and other means for the employee cannot be delegated to a servant so as to exempt the former from liability for injuries caused to another servant by its omission. The servant does not undertake to incur the risk arising from negligence in providing or maintaining a safe place in which he is to work, or suitable and safe appliances, or other means with which his service is to be performed. His contract implies that, in regard to these matters, his employer will exercise reasonable care in making adequate provision that no danger shall ensue to him, and he has a right to assume and rely and act upon the assumption that such care has been exercised."

To the giving of which instruction the defendant then and there, in open court, duly excepted to the whole thereof, and specially excepted to the following portion of said instruction: "The servant does not undertake to incur the risk arising from negligence in providing or maintaining a safe place in which he is to work, or suitable and safe appliances, or other means with which his service is to be performed. His contract implies that, in regard to these [224] matters, his employer will exercise reasonable

care in making adequate provision that no danger shall ensue to him, and he has a right to assume and rely and act upon the assumption that such care has been exercised," on the ground that a servant assumed the risk of all negligence of the master of which he knew, fully comprehended or understood and appreciated, or of which he should, by the exercise of ordinary care on his part, have known, fully comprehended, understood and appreciated, that is, if the servant is negligently provided an unsafe place in which to work, or unsafe machinery or appliances with which to work and knew of the unsafety thereof and fully comprehended, understood and appreciated, the danger incident to working in said unsafe place or with unsafe machinery, tools or appliances, he assumed the risk thereof. That the contract of employment between the employer and employee does not imply that an employer will exercise reasonable care in making adequate provision that no danger shall ensue to the employee, and that all that is required is that the employer will exercise ordinary care to provide a reasonably safe place in which the employee shall work and reasonably safe appliances with which to work; that the employee has no right to assume or rely or act upon the assumption that a place is reasonably safe where there are open, apparent and obvious dangers; that, in the case at bar, there was no evidence that the place in which plaintiff was to work or appliances with which to work were unsafe, provided the employee used the place in which to work and the materials with which to work with reasonable care; that the spiked

or dog-roller over which plaintiff stepped and which caused [225] his injuries was open and apparent; that the danger incident to stepping over said roller or attempting to step over same was an open, apparent and obvious danger which the plaintiff, or any other person should have known, fully comprehended and appreciated and understood by exercising ordinary care; that the plaintiff would not have a right to shut his eyes to an open and obvious peril, nor had he any right to assume that the spiked or dog-roller was safe, or to indulge in any assumption that there was no hazard in attempting to step over it, or to step on to the push-table; that the plaintiff knew that lumber of all sizes was constantly and rapidly being run upon the push-table and passing over the same, and the danger of getting upon the push-table, or over or across the dog-roller was open and apparent and obvious and that the plaintiff knew thereof, fully appreciated, comprehended and understood the danger incident thereto, or should have fully known, comprehended and appreciated the danger incident thereto had he been exercising ordinary care or caution, and he had no right to indulge in any presumption or assumption of safety in getting to the push-table over the dog-roller, which was contrary to the facts, which he knew or should have known, which exception defendant designates as Exception No. IV.

Exception No. V.

VI.

“The Court further instructs you, that, if the place where plaintiff was working and the machinery with

which he worked at the time of the accident were unsafe, as alleged in the complaint, but plaintiff knew them to be unsafe, and fully understood, comprehended and appreciated the dangers incident to their use, then defendant would not be chargeable with negligence in assigning him to the work in which he was [226] engaged when injured.”

To the giving of which said instruction the defendant then and there, in open court, duly excepted to the whole of said instruction, and specially excepted for the reason that the servant not only assumed the risk of working with unsafe machinery and in an unsafe place, which he fully understood, comprehended and appreciated the dangers incident thereto, but also assumed the risk of working with defective and dangerous machinery where he would have fully understood, comprehended and appreciated the danger incident thereto if he had exercised ordinary care and caution. Which said exception defendant designates as Exception No. V. [227]

Exception No. VI.

VII.

“The Court further instructs you, that, at the time plaintiff was injured, there was in force a statute of California, which contains the following provision:

‘Knowledge by an employee injured of the defective or unsafe character or condition of any machinery, ways, appliances or structures of such employer, shall not be a bar to recovery for any injury or death caused thereby, unless it shall also appear that such employee fully understood, comprehended and appreciated the dangers incident to the use of such defec-

tive machinery, ways, appliances or structures, and therefore consented to use the same or continued in the use thereof.'

This statute applies to the consideration by you of the entire evidence in its bearing upon the allegations of the complaint charging the defendant with negligence, and the allegations of the answer denying the negligence so charged and charging the plaintiff with negligence, and with having assumed the risk incident to the business and work in which he was employed and with having contributed to his alleged injury by his own concurring negligence."

To the giving of which said instruction the defendant then and there, in open court, duly excepted, and specially excepted upon the ground that said instruction did not state to the jury that a servant assumed the risk of the danger incident to working about defective or unsafe ways, machinery, appliances or structures which the servant should have fully understood, comprehended and appreciated if he had exercised ordinary care. Which exception defendant designates as Exception No. VI. [228]

Exception No. VII.

VIII.

"The Court further instructs you, that, in passing upon the question whether plaintiff did fully understand, comprehend and appreciate the dangers incident to the place where and the machinery with which he was working, it is proper for you to consider, with all the other evidence, the evidence as to the age, experience and maturity of judgment of the plaintiff at the time the injury was received.

“Where a master employs a servant to do dangerous work, or to do work that must necessarily require him to move in and about moving machinery of a dangerous nature, who, from youth, inexperience, ignorance or want of capacity may fail to appreciate the danger surrounding him by such work, and the master knows, or by the exercise of ordinary care, could know, of the servant’s failure to appreciate the danger incident to his work, it is a breach of duty for the master to expose such servant, even with his own consent, to such danger, or to place him in a position where it shall become necessary for him to encounter the same, without first giving him such full and complete instructions as will enable him to fully and completely comprehend them and to do the work safely and with proper care on the servant’s part.”

To the giving of which instruction the defendant then and there, in open court, duly excepted, and specially excepted upon the ground that said instruction limited the jury to inquiries whether plaintiff did fully understand, comprehend and appreciate the danger incident to the place or the [229] machinery with which he was working and did not direct them or permit them to inquire whether plaintiff should have fully understood, comprehended or appreciated the danger incident to the place in which he was working or the machinery with which he was working had he been exercising ordinary care, and further that there was no evidence to warrant the second paragraph of said instruction or to justify the Court in submitting it to the said jury. There was no evidence in the case to warrant the jury in find-

ing that the plaintiff either from his youth, inexperience, ignorance or want of capacity failed to appreciate the danger surrounding him by his work or that the defendant knew, or by the exercise of ordinary care should have known that plaintiff was unable to appreciate the danger, if any there was, surrounding him in his work or that the said plaintiff, by reason of youth, inexperience, ignorance or want of capacity would fail, or did fail to appreciate the danger, if any there was, surrounding him at the time of his work, or that the defendant had any knowledge that the said plaintiff was a minor or did not have sufficient age, experience, or capacity to appreciate the open and obvious danger surrounding him in his work, nor was there any evidence in the case that the defendant did not give to the plaintiff full and complete instructions as to his work and the dangers incident thereto, nor is there any evidence that the plaintiff did not fully and completely comprehend the dangers incident to his work or how to do the work safely or with proper care upon his part. Which exception defendant designates as Exception VII. [230]

Exception No. VIII.

IX.

“The Court further instructs you, that, if the plaintiff was, by reason of his youth or inexperience, of such immature judgment and incapacity as to be unable to understand, comprehend and appreciate the dangers incident to his work, still it was not negligent for the defendant to place him upon such work, unless the defendant knew, or had reason to believe,

that the plaintiff was of such immature judgment or so incapacitated, and, in determining this last question, you will consider in connection with all the other evidence in the case, the personal appearance and conduct of the plaintiff at the time of his employment and assignment to said work by the defendant."

To the giving of which said instruction the defendant then and there, in open court, duly and regularly excepted to the whole thereof; and specially excepted to the following portion: "And, in determining this last question you will consider, in connection with all the other evidence in the case, the personal appearance and conduct of the plaintiff at the time of his employment and assignment to said work by the defendant," upon the ground that there was no evidence as to the personal appearance or conduct of the plaintiff at the time of his employment and assignment to work or any evidence tending to show that he appeared or conducted himself other than as an adult and a person fully able to comprehend, appreciate and understand an open, apparent and obvious danger and fully understand, comprehend and appreciate the kind and character of the work to which he was assigned, which exception defendant designates as Exception VIII. [231]

X.

"The jury are instructed that if you find from the evidence that plaintiff was a minor on the 30th day of July, 1907, at the time he received the injuries complained of, and you should further find, from the evidence, that the dangers, if any, to which he was

exposed in working on and about the push-table and carrying-table connected with defendant's sawmill, were not concealed, but that plaintiff had full knowledge of and fully comprehended and appreciated the dangers incident to the ordinary use of the machinery, ways, appliances and structures with, upon or about which he was required to work, and with such knowledge and understanding continued in the employment of defendant and continued in the use of such machinery, ways, appliances and structures, then plaintiff assumed the risks of his employment, and defendant was not required to warn him of the same." [232]

XI.

"The Court further instructs you, that the proximate cause of an injury in a damage case is that cause which naturally led to and which by a prudent person might reasonably have been expected to be instrumental in producing the injury complained of. In determining whether a certain act is the proximate cause of an injury, the proper test is: Was the injury complained of, of such a character as might reasonably have been foreseen, or reasonably have been expected to follow as the result of such an act? The rule of proximate cause has the same application in a damage suit in which a minor is plaintiff as in the case of an adult."

Exception No. IX.

XII.

"Whether or not defendant was negligent as charged in the complaint, and, if so, whether or not such negligence proximately caused plaintiff's in-

juries, are questions of fact submitted to you for determination without any expression of opinion thereon by the Court.

If the evidence fails to satisfy you that the defendant was negligent as alleged in the complaint, or, that its negligence, if any, was a proximate cause of plaintiff's injuries, your verdict will be for the defendant.

If, however, you believe from the evidence that defendant was negligent as alleged in the complaint, and that such negligence was a proximate cause of plaintiff's injuries, you will next consider the affirmative defenses which I have already mentioned, and about which I will now more fully instruct you."

[233]

To the giving of which instruction the defendant then and there, in open court, duly excepted on the ground that there was no evidence proving, or tending to prove that defendant was guilty of any negligence whatever, or any negligence which contributed directly or proximately, or at all, to the injuries sustained by plaintiff; that it also appeared from the evidence that the plaintiff himself was guilty of contributory negligence and that he was injured as a result of an open, obvious and apparent risk, the danger of which he fully comprehended, knew, appreciated and understood, or should, by the exercise of ordinary care upon his part, have fully known, comprehended and appreciated and understood; which exception defendant designates as Exception No. IX.

XIII.

"Contributory negligence is such an act or omis-

sion on the part of the person injured, amounting to a want of ordinary care, as, concurring and co-operating with any negligent act or omission on the part of the defendant, was a proximate cause of the injury.

Ordinary care is such care as would be used by an ordinarily prudent person in the same or similar circumstances."

Exception No. X.

XIV.

"The Court further instructs you that the ordinary care which a youth of limited judgment and experience is called upon to exercise is not the same *quantum* of care which the adult would be called upon to use under the same circumstances. Each is required to use ordinary care, but the care which the person of mature intelligence and judgment must employ is different from the amount which the law exacts [234] of a youth of immature age, judgment and experience."

To the giving of which instruction the defendant then and there, in open court, duly excepted to the whole thereof, and specially excepted to it upon the ground that there was no evidence to warrant the jury in finding that the plaintiff in the case at bar possessed limited judgment or experience, nor was there any evidence to warrant the jury in finding that plaintiff was not as competent as an adult to fully comprehend, appreciate and understand the danger of the work which he was performing, or the appliances about which he was working, and further specially excepted to the following portion of said

instruction: "Each is required to use ordinary care, but the care which the person of mature intelligence and judgment must employ is different from the amount which the law exacts of a youth of immature age, judgment and experience," on the ground that the law does not exact a different amount of care from an adult than from a youth. That each is required to exercise ordinary care and *as* is required to guard himself from open and obvious dangers which he knows, comprehends, appreciates and fully understands, or should by the exercise of ordinary care upon his part have fully appreciated, known, comprehended and understood, which said exception defendant designates as Exception No. X.

Exception No. XI.

XV.

"The burden of proof of contributory negligence is upon the defendant, to establish the same by a preponderance of the evidence, unless you find from the plaintiff's own [235] testimony that he was guilty of contributory negligence."

To the giving of which instruction the defendant then and there, in open court, duly excepted, and specially excepted upon the ground that the defendant may avail itself both of the evidence offered by plaintiff and by defendant, and it is not bound to establish by a preponderance of the evidence contributory negligence upon the part of the plaintiff unless the same appears affirmatively from plaintiff's own testimony, that the defendant to establish contributory negligence may use said testimony or evidence offered by plaintiff, together with testimony and evi-

dence offered by itself; that the instruction placed a burden upon the defendant of proving contributory negligence unless the same should affirmatively appear from plaintiff's testimony and the jury must have been led to believe that if it did not appear affirmatively from plaintiff's testimony they could not consider evidence, if any, offered by plaintiff which tended to show contributory negligence upon the part of the plaintiff, which exception defendant designates as Exception No. XI.

Exception No. XII.

XVI.

“The Court further instructs you that plaintiff, although a minor, on entering defendant's employment, assumed all the ordinary risks of such employment which he fully knew, understood, comprehended and appreciated.”

To the giving of which instruction the defendant [236] then and there, in open court, duly excepted to the whole thereof, and specially excepted upon the ground that the plaintiff not only assumed all the ordinary risks of the employment which he fully knew, understood, comprehended and appreciated, but also assumed all the risks of his employment, whether ordinary or otherwise, of which he fully knew, understood, comprehended and appreciated, and also that plaintiff assumed all the risk incident to his employment of which he should have fully known, understood, comprehended and appreciated by the exercise of ordinary care, which exception defendant designates as Exception No. XII.

Exception No. XIII.**XVII.**

“Whether or not plaintiff was guilty of contributory negligence, or whether or not his injuries resulted from the ordinary risks of his employment, which he assumed, are also issues which the Court submits to your determination without expressing any opinion thereon.”

To the giving of which instruction the defendant, [237] then and there, in open court, duly excepted, and specially excepted upon the ground that it appeared from the evidence that plaintiff was guilty of contributory negligence as a matter of law, and therefore the question ought not to be submitted to the jury, and it further appeared from the undisputed evidence that plaintiff was injured by a risk which he fully knew, comprehended, understood and appreciated, or should have fully known, comprehended, understood and appreciated, had he exercised ordinary care, and that therefore the issue should have not been submitted to said jury, and, further, that the Court should not limit the question as to whether plaintiff was injured by an ordinary risk of his employment which he assumed, for the reason that plaintiff assumed all risk of his employment, whether ordinary or extraordinary, of which he knew, fully comprehended, appreciated and understood, or which by the exercise of ordinary care on his part he should have fully known, comprehended, appreciated and understood. Which said exception defendant designates as Exception No. XIII.

Exception No. XIV.**XVIII.**

“If the evidence fails to satisfy you that the defendant is negligent in any of the particulars alleged in the complaint, or, if you find that defendant was so negligent, but the evidence fails to satisfy you that said negligence was the proximate cause of plaintiff’s injuries, or, if you believe from the evidence that plaintiff, prior to his injuries, knew of the unsafe condition of defendant’s structures and machinery, which plaintiff claims caused said injuries, if they were unsafe, and fully understood, comprehended and appreciated the dangers incident to their [238] use, and thereafter continued in defendant’s employ, or, if you believe from the evidence that plaintiff was in any way negligent, and that such negligence directly contributed to his injuries, your verdict will be for the defendant.

If, however, you believe from the evidence that the defendant was negligent as alleged in the complaint, and that said negligence was the proximate cause of plaintiff’s injuries, without contributory negligence on his part, and without knowledge by him, prior to his injuries, of the unsafe condition of defendant’s structures and machinery, or full understanding, comprehension and appreciation by him of the dangers incident to their use, your verdict will be for the plaintiff.”

To the giving of which instruction the defendant then and there, in open court, duly excepted to the whole of said instruction, and specially excepted on the ground that there was no evidence justifying the submission of said cause to the jury and no evi-

dence proving or tending to prove that defendant was guilty of any negligence; and on the ground that it further appeared from the evidence that the plaintiff himself was guilty of negligence that is a want of ordinary care and caution which contributed directly and proximately to the injuries sustained by him and that he was injured as a result of a risk which he assumed, the danger of which was open, apparent and obvious and which he fully knew, comprehended, understood and appreciated, or which he should have fully known, comprehended, understood and appreciated had he been exercising ordinary care for his own safety and protection, [239] and further specially excepted to the following portion of said charge: "If, however, you believe from the evidence that the defendant was negligent as alleged in the complaint, and that said negligence was the proximate cause of plaintiff's injuries, without contributory negligence on his part, and without knowledge by him, prior to his injuries, of the unsafe condition of defendant's structures and machinery, or full understanding, comprehension and appreciation by him of the dangers incident to their use, your verdict will be for the plaintiff," upon the ground that there was no evidence that defendant was guilty of negligence which was the proximate, or any, cause of plaintiff's injuries, and upon the ground that plaintiff was guilty of contributory negligence and on the ground that it further appeared from the evidence that prior to his injuries plaintiff had knowledge, or should have had knowledge of any unsafe condition, if any,

of defendant's structure and machinery, and fully understood, comprehended and appreciated the danger, if any there was, incident to the use thereof, or should have fully understood, comprehended and appreciated such danger, if any there was, incident to the use of defendant's structure or machinery, if the said plaintiff had been exercising ordinary care, and on the ground further that the said portion of the instruction directed the jury to find a verdict in favor of plaintiff if he was injured by reason of any defective or dangerous structure or machinery of which the plaintiff did not actually know, fully understand, comprehend or appreciate the dangers incident thereto, even though [240] the plaintiff should have known, fully understood, comprehended and appreciated such dangers had he been exercising ordinary care; in other words, said instruction authorized the plaintiff to recover if he did not actually know, fully understand, comprehend and appreciate the dangers incident to working about the structure or machinery of said defendant, even though his failure to have such actual knowledge, comprehension, understanding and appreciation was by reason of the absolute inattention, carelessness and negligence on his part, which said exception defendant designates as No. XIV. [241]

Exception No. XV.

XIX.

“If you find for the plaintiff, it will be your duty to assess the amount of damages he is entitled to recover, and, in estimating these damages, you may consider his age, what, before the accident, was his

health and physical condition, the extent to which the injuries he received are permanent and will affect his health and physical condition in the future, and also his bodily pain and mental anguish, if any, which he has or will proximately—that is, naturally and without the intervention of some other cause—result from said injuries, and allow plaintiff such sum for damages as in your opinion will fairly compensate him for all of said injuries.”

To the giving of which instruction the defendant then and there, in open court, duly excepted, on the ground that there was no evidence justifying the submission of said cause to the jury or the award by the jury of damages to the plaintiff, which said exception defendant designates as Exception No. XV.

XX.

“The Court further instructs you that, in considering your verdict, you should not be governed by sympathy or prejudice for or against either party.”

XXI.

“The Court further instructs you that before a verdict can be returned it must be concurred in by each of the twelve jurors sworn to try the case.”

[242]

Exception No. XVI.

The defendant requested the Court to give to the jury the following instruction:

I.

“The jury are instructed that it was the duty of the defendant in this case to use only ordinary care in furnishing to the plaintiff at and before the

time of the accident complained of, a reasonably safe place and reasonably safe surroundings in which to work, and to use reasonable care in maintaining and keeping such place in a reasonably safe condition."

Which the Court refused to give, and to the refusal to give which the defendant then and there, in open court, duly and regularly excepted, which exception defendant designates as Exception No. XVI.

Exception No. XVII.

The defendant requested the Court to give to the jury the following instruction:

II.

"Negligence on the part of defendant is not presumed. It is an affirmative fact which plaintiff must prove by a preponderance of the evidence, and the negligent acts proved, if any, must be such particular acts as are alleged in the plaintiff's complaint. The burden of proof is on the plaintiff, and if you find that the evidence bearing on the question of negligence on the part of defendant is evenly balanced, or that it preponderates in favor of the defendant, then and in that case the plaintiff cannot recover and your verdict must be for the defendant."

Which the Court refused to give, and to the refusal to give which the defendant then and there, in open court, duly and regularly excepted, which said exception defendant designates as Exception No. XVII. [243]

Exception No. XVIII.

The defendant requested the Court to give to the jury the following instruction:

III.

“The defendant was under no obligation to keep the plaintiff absolutely safe and free from danger, nor to insure the plaintiff against accident. His duty, to express it tersely, was to use ordinary care to secure the plaintiff’s safety. ‘Ordinary care,’ you are instructed, is the care that is ordinarily exercised by a person of average prudence under the same or similar circumstances. Just what that degree of care is or would be, is for the jury to determine. Having determined what, under the circumstances, would have been ordinary care, it is for you to say whether such care was exercised by the defendant about the premises in question.”

Which the Court refused to give, and to the refusal to give which the defendant then and there, in open court, duly and regularly excepted, which said exception defendant designates as Exception No. XVIII.

Exception No. XIX.

The defendant then requested the Court to give to the jury the following instruction:

IV.

“The jury are instructed that the defendant was not bound as an insurer to the absolute safety and suitability of the machinery and appliances furnished by it for use in its business, and that it was not bound to furnish the very best or most improved kind of machinery to be used at its mills. It was sufficient if the appliances connected with the same

were reasonably safe and suitable for the purposes for which they were used.” [244]

Which the Court refused to give, and to the refusal to give which the defendant then and there, in open court, duly and regularly excepted, which said exception defendant designates as Exception No. XIX.

Exception No. XX.

The defendant requested the Court to give to the jury the following instruction:

V.

“The Court instructs you that if you believe from the evidence that the plaintiff was not using ordinary care at the time and place of his injury, and that his failure to use such care directly contributed to cause his injury, then you will find for the defendant, and you are instructed that ordinary care is such care as would be used by an ordinarily prudent person under the same or similar circumstances.”

Which the Court refused to give, and to the refusal to give which the defendant then and there, in open court, duly and regularly excepted, which said exception defendant designates as Exception XX.

Exception No. XXI.

The defendant then requested the Court to give to the jury the following instruction.

VI.

“You are further instructed that if there were any latent or obscure dangers or defects connected with the machinery in and about which plaintiff worked, that it was then the duty of the defendant to explain such latent defects or obscure dangers to the plain-

tiff and warn him of the dangers connected therewith. But if you shall find from the evidence [245] that the only dangers connected with the machinery around which plaintiff was employed were in plain view, and were not in any respect hidden, and were such dangers that the plaintiff had full knowledge of and fully comprehended and appreciated, then and in such event no obligation existed on the part of the defendant to warn plaintiff of the danger of his employment and if injured under such circumstances, then plaintiff cannot recover."

Which the Court refused to give, and to the refusal to give which the defendant then and there, in open court, duly and regularly excepted, which said exception defendant designates as Exception No. XXI.

Exception No. XXII.

The defendant requested the Court to give to the jury the following instruction:

VII.

"The jury are further instructed that if you find from the evidence that plaintiff was a minor on the 30th day of July, 1907, at the time he received the injuries complained of and you should further find, from the evidence, that the dangers, if any, to which he was exposed in working on and about the push-table and carrying-table connected with defendant's sawmill were not concealed, but that plaintiff had full knowledge of and fully comprehended and appreciated the dangers incident to the ordinary use of the machinery, ways, appliances and structures with, upon or about which he was required to work,

and with such knowledge and understanding continued in the employment of the defendant and continued in the use of such machinery, ways, appliances and structures, then and in that event the defendant was not required to warn the plaintiff of [246] such dangers and the plaintiff thereby assumed the risks of his employment and is not entitled to a verdict against the defendant for damages growing out of his injuries sustained by reason of the accident set forth in the complaint."

Which the Court refused to give, and to the refusal to give which the defendant then and there, in open court, duly and regularly excepted, which said exception defendant designates as Exception No. XXII.

Exception No. XXIII.

The defendant requested the Court to give to the jury the following instruction:

VIII.

"The proximate cause of an injury in a damage case is that cause which naturally led to and which by a prudent person might reasonably have been expected to be instrumental in producing the injury complained of. In determining whether a certain act is the proximate cause of any injury, the proper test is: 'Was the injury complained of, of such a character as might reasonably have been foreseen, or reasonably have been expected to follow as the result of such an act.' The rule of proximate cause has the same application in a damage suit in which a minor is plaintiff, as in the case of an adult."

Which the Court refused to give, and to the re-

fusal to give which the defendant then and there, in open court, duly and regularly excepted, which said exception defendant designates as Exception No. XXIII. [247]

Exception No. XXIV.

The defendant requested the Court to give to the jury the following instruction:

IX.

“The jury are instructed that in the present action plaintiff seeks to recover damages by reason of certain injuries alleged to have been sustained by him and growing out of the alleged negligence of the defendant. Negligence which will entitle plaintiff to recover, and which plaintiff must prove before he will be entitled to a verdict, consists in the failure of the defendant to do that which a person of ordinary prudence and intelligence would do under the same or similar circumstances, or in the doing of that which a person of ordinary prudence or intelligence would not have done under the same or similar circumstances, and before you will be justified in returning a verdict for the plaintiff in this case, it will be necessary for you to find, from the evidence, that the defendant in the construction and operation of the machinery, ways, appliances and structures about which plaintiff was employed had omitted to take such precautions to prevent injury to the plaintiff, as an ordinarily prudent and intelligent person would have taken under the same or similar circumstances, or that defendant had done something which an ordinarily prudent and intelligent person would not have done under the same or

similar circumstances.”

Which the Court refused to give, and to the refusal to give which the defendant then and there, in open court, duly and regularly excepted, which said exception defendant designates as Exception No. XXIV. [248]

Exception No. XXV.

The defendant requested the Court to give to the jury the following instruction:

X.

“The jury are instructed that if the defendant did not know as a matter of fact that plaintiff was a minor at the time of his employment, or that the defendant was not in possession of facts and circumstances, from which it should have known that the plaintiff was a minor, then no greater obligation rested upon the defendant to warn the plaintiff of dangers that were apparent and were not concealed or hidden than there would have been to warn a man who have reached his majority. In taking into consideration the age of the plaintiff, defendant had a right to rely upon the conduct and demeanor of the plaintiff, his size, appearance and ability to do a man’s work.”

Which the Court refused to give, and to the refusal to give which the defendant then and there, in open court, duly and regularly excepted, which said exception defendant designates as Exception No. XXV.

Exception No. XXVI.

The defendant requested the Court to give to the jury the following instruction:

XI.

“The jury are hereby instructed that if they shall find from the evidence that plaintiff had knowledge of the fact that there were two ways by means of which he could have climbed upon the push-table—the one way being to step over the spiked roller and the other way being to climb over the side of the push-table, by means of the lumber buggies; the [249] first way being extremely dangerous and so known to him to be, and the other way safe and known by him to be so. And if you shall believe from the evidence that he voluntarily chose the dangerous way of going upon said push-table, when there was no occasion or necessity for so doing, and in so doing received the injury of which he complains, that he cannot hold the defendant responsible for an injury which directly resulted from his voluntary and unnecessary choice of the more dangerous of the two ways of doing the work he attempted to do.”

Which the Court refused to give, and to the refusal to give which the defendant then and there, in open court, duly and regularly excepted, which said exception defendant designates as Exception No. XXVI.

Exception No. XXVII.

The defendant requested the Court to give to the jury the following instruction:

XII.

“The law requires of a minor suing for personal injuries, care and prudence equal to his capacity, and if you find from the evidence that the plaintiff

in this action knew of the character of the machine which caused his injury and was aware of its dangerous character and carelessly and negligently tried to step over the spiked roller onto the push-table, so that his injury occurred or was inflicted without fault on the part of the defendant, then your judgment will be in favor of the defendant.”

Which the Court refused to give and to the refusal to give which the defendant then and there, in open court, duly and regularly excepted, which said exception defendant designates as Exception XXVII. [250]

No other or further instructions were given to the jury by the Court than are set out in this Bill of Exceptions and each and all of the exceptions hereinbefore set out taken to the charge of the Court and to the various instructions given by the Court to the jury as hereinbefore set out, and each and all of the exceptions taken by the defendant to the refusal of the Court to give each of the instructions which were requested and which were refused as hereinbefore set out, were taken and reserved by the counsel for defendant, in open court, before the jury had been directed to retire and consider their verdict and while the jury was present in court.

Thereupon, and after the jury had retired to consider their verdict, the Court duly made and entered an order giving the defendant to and including the 6th day of October, 1913, within which to serve and file its Bill of Exceptions, and thereafter the said parties stipulated that the defendant should have to and including the 20th day of November, 1913,

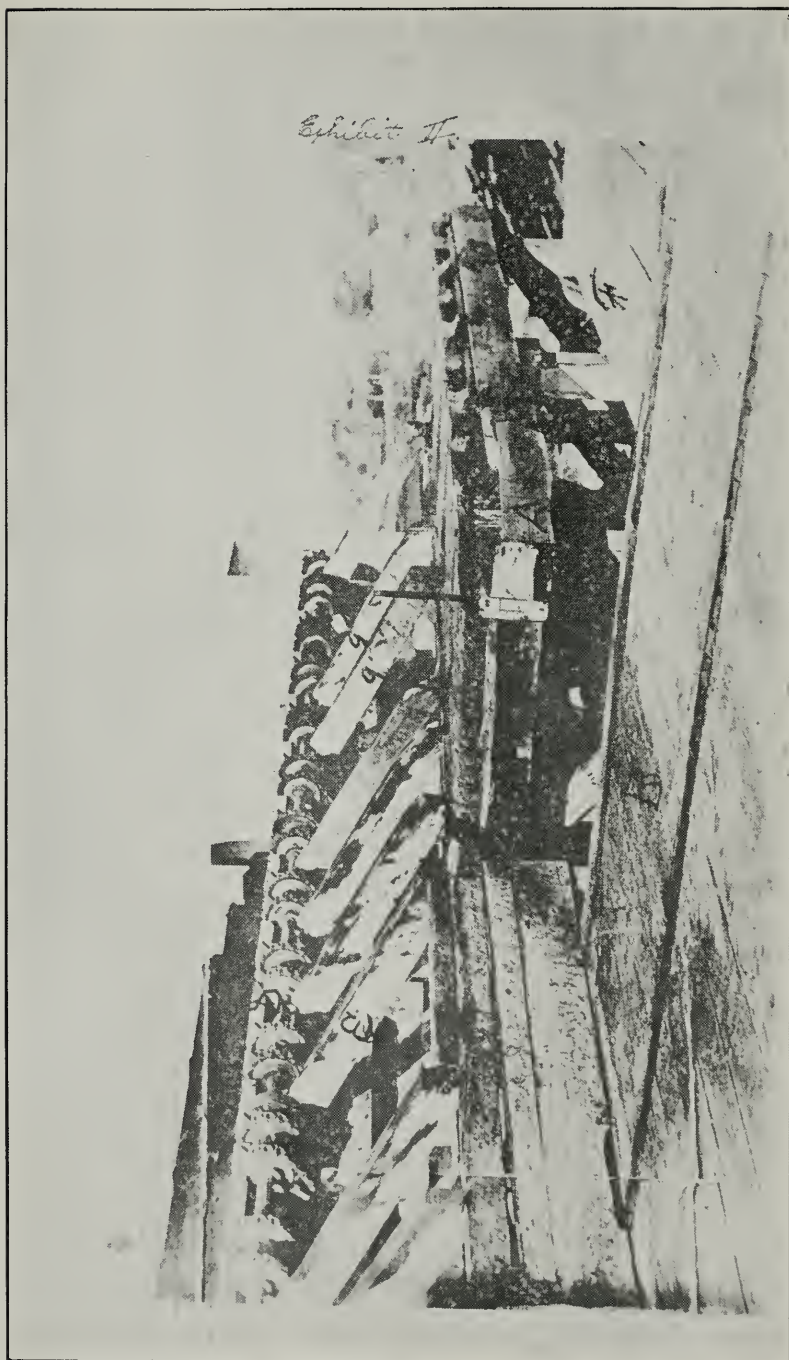
within which to serve and file its said Bill of Exceptions, and upon which said stipulation the Court duly and regularly made an order giving said defendant to and including the 20th day of November, 1913, within which to serve and file its Bill of Exceptions, and the said Bill of Exceptions has been prepared, served and filed within the time by law, and as extended by stipulations of counsel and the order of the Court, and counsel for defendant asks that the same be allowed and approved as correct.

GIBSON, DUNN & CRUTCHER,

WRIGHT & WINNEK,

Attorneys for Defendant. [251]

[Plaintiff's Exhibit II.]



**[Stipulation for Settlement of Bill of Exceptions,
etc.]**

IT IS HEREBY STIPULATED that the foregoing Bill of Exceptions has been duly and regularly served and filed within the time allowed by the stipulation of the respective parties hereto and by the order of the Court duly and regularly made, and that said Bill of Exceptions is correct in all respects and may be settled and made a part of the record herein.

HUNSAKER & BRITT,
HAINES & HAINES,

Attorneys for Plaintiff.

GIBSON, DUNN & CRUTCHER,
LOBDELL,

WRIGHT & WINNEK,

Attorneys for Defendant. [254]

Order Approving Bill of Exceptions.

The foregoing Bill of Exceptions, duly proposed and agreed upon by counsel for the respective parties, is correct in all respects and is hereby approved, allowed and made a part of the record herein.

Dated this 5th day of Jan., 1914.

OLIN WELLBORN,
Judge.

**[Stipulation That Bill of Exceptions was Filed in
Due Time, etc.]**

It is hereby stipulated that the foregoing bill was filed within due time and that it be signed and settled by the Judge with the same force and effect

as though signed and settled on the 20 day of Nov., 1913.

HUNSAKER & BRITT and
HAINES & HAINES,

Attys. for Plff.

WRIGHT & WINNEK,

GIBSON, DUNN & CRUTCHER,

Attorneys for Def. [255]

*In the District Court of the United States for the
Southern District of California, Southern Di-
vision.*

H. C. McCANN, by JESSE F. McCANN, His Guard-
ian *ad Litem*,

Plaintiff,

vs.

BENSON LUMBER COMPANY, a Corporation,
Defendant.

Assignment of Errors.

Comes now the defendant above named and filed the following assignment of errors upon which it will rely upon its prosecution of the writ of error in the above-entitled cause, petition for which writ it filed at the same time with this assignment.

I.

The Court erred in denying the motion of the defendant to direct the jury to return a verdict in favor of said defendant, as set forth in Exception No. II, Bill of Exceptions, which said motion was as follows:

“Both sides having rested the defendant then and

there moved the said Court to direct the jury to return a verdict in favor of the said defendant upon the following grounds:

“1. There was no evidence proving or tending to prove any negligence on the part of the defendant.

“2. There was no evidence proving or tending to prove that negligence, if any, upon the part of the defendant contributed directly or proximately, or at all, to the injuries sustained by the plaintiff.

“3. That it affirmatively appeared from the evidence that the plaintiff himself was guilty of negligence, that is that said plaintiff did not exercise ordinary care or caution [256] for his own safety and protection, and that the failure upon the part of the plaintiff to exercise ordinary care and caution for his own safety and protection contributed directly and proximately to the injuries sustained by him.

“4. It affirmatively appeared from the evidence that the injuries sustained by plaintiff were the result of a risk assumed by him in the usual course of his employment; that the dog or spike roller was open, apparent and obvious and the danger of attempting to climb to the push-table or go to the push-table across said roller was an open and obvious risk of which plaintiff fully knew, comprehended and understood and appreciated, or should have, by the exercise of ordinary care on his part, have fully known, comprehended and understood and appreciated. Plaintiff was not injured by reason of any concealed or latent danger but was injured as a result of a danger which was open and obvious and

of which plaintiff fully knew and realized, comprehended and understood, or of which he should have fully known, realized, comprehended and understood had he exercised ordinary care for his own safety and protection.”

II.

The Court erred in giving instruction number IV to the jury as follows:

“The first issue to which the Court directs your attention is: Was the defendant negligent?

“The Court charges you, that negligence is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate human affairs would do, or doing something which a prudent or reasonable man would not do. The question whether or not there was negligence in a particular instance, must be determined in the light of all the circumstances and conditions as [257] shown in evidence at the time surrounding the person against whom the negligence is charged.

“On this issue, the Court further instructs you, that the mere happening of the accident raises no presumption, that the defendant corporation was negligent, but the burden of proving negligence by a preponderance of evidence is upon the plaintiff, and the negligence, if any is proven, must be that alleged in the complaint, and, unless such negligence is so proven, your verdict must be for the defendant.”

As set forth in Exception No. III of the Bill of Exceptions.

III.

The Court erred in giving instruction number V

to the jury as follows:

“The Court instructs you, that an employer is not to be held as guaranteeing or insuring the absolute safety of the employee, or the place in which he is to work, but it is the duty of the employer to exercise reasonable care in providing and maintaining a safe place for the employee to work and sufficient and safe material, appliances and other means, by which the service is to be performed. Furthermore, this duty of the employer to exercise reasonable care for the employee cannot be delegated to a servant so as to exempt the former from liability for injuries caused to another servant by its omission. The servant does not undertake to incur the risk arising from negligence in providing or maintaining a safe place in which he is to work, or suitable and safe appliances, or other means with which his service is to be performed. His contract implies that, in regard to these matters, his employer will exercise reasonable care in making adequate provision that [258] no danger shall ensue to him, and he has a right to assume and rely and act upon the assumption, that such care has been exercised.”

As set forth in Exception No. IV of the Bill of Exceptions.

IV.

The Court erred in giving instruction number VI to the jury as follows:

“The Court further instructs you, that, if the place where plaintiff was working and the machinery with which he worked at the time of the accident were unsafe, as alleged in the complaint, but plain-

tiff knew them to be unsafe, and fully understood, comprehended and appreciated the dangers incident to their use, then defendant would not be chargeable with negligence in assigning him to the work in which he was engaged when injured.”

As set forth in Exception No. V of the Bill of Exceptions.

V.

The Court erred in giving instruction number VII to the jury as follows:

“The Court further instructs you, that, at the time plaintiff was injured, there was in force a statute of California which contains the following provision:

“Knowledge by an employee injured of the defective or unsafe character or condition of any machinery, ways, appliances or structures of such employer, shall not be a bar to recovery for any injury or death caused thereby, unless it shall also appear that such employee fully understood, comprehended and appreciated the dangers incident to the use of such defective machinery, ways, appliances or structures, and therefore consented to use the same or continued in the use thereof.” [259]

“This statute applies to the consideration by you of the entire evidence in its bearing upon the allegations of the complaint charging the defendant with negligence, and the allegations of the answer denying the negligence so charged and charging the plaintiff with negligence, and with having assumed the risk incident to the business and work in which he was employed and with having contributed to his

alleged injury by his own concurring negligence.”

As set forth in Exception No. VI of the Bill of Exceptions.

VI.

The Court erred in giving instruction No. VIII to the jury as follows:

“The Court further instructs you, that, in passing upon the question whether plaintiff did fully understand, comprehend and appreciate the dangers incident to the place where and the machinery with which he was working, it is proper for you to consider, with all the other evidence, the evidence as to the age, experience, and maturity of judgment of the plaintiff at the time the injury was received.

“Where a master employs a servant to do dangerous work, or to do work that must necessarily require him to move in and about moving machinery of a dangerous nature, who, from youth, inexperience, ignorance or want of capacity may fail to appreciate the danger surrounding him by such work, and the master knows, or by the exercise of ordinary care, could know, of the servant’s failure to appreciate the danger incident to his work, it is a breach of duty for the master to expose such servant, even with his own consent, to such danger, or to place him in a position where it shall become necessary for him to encounter the same, without first giving him such full and complete [260] instructions as will enable him to fully and completely comprehend them and to do the work safely and with proper care on the servant’s part.”

As set forth in Exception No. VII of the Bill of Exceptions.

VII.

The Court erred in giving instruction number IX to the jury as follows:

“The Court further instructs you, that, if the plaintiff was, by reason of his youth or inexperience, of such immature judgment and incapacity as to be unable to understand, comprehend and appreciate the dangers incident to his work, still it was not negligent for the defendant to place him upon such work, unless the defendant knew, or had reason to believe, that the plaintiff was of such immature judgment or so incapacitated, and, in determining this last question, you will consider, in connection with all the other evidence in the case, the personal appearance and conduct of the plaintiff at the time of his employment and assignment to said work by the defendant.”

As set forth in Exception No. VIII of the Bill of Exceptions.

VIII.

The Court erred in giving instruction number XII to the jury as follows:

“Whether or not defendant was negligent as charged in the complaint, and, if so, whether or not such negligence proximately caused plaintiff’s injuries, are questions of fact submitted to you for determination without any expression of opinion thereon by the Court.”

“If the evidence fails to satisfy you that the defendant was negligent as alleged in the complaint,

or that its negligence, if any, was a proximate cause of [261] plaintiff's injuries, your verdict will be for the defendant.

"If, however, you believe from the evidence, that defendant was negligent as alleged in the complaint, and that such negligence was a proximate cause of plaintiff's injuries, you will next consider the affirmative defenses which I have already mentioned, and about which I will now more fully instruct you."

As set forth in Exception No. IX of the Bill of Exceptions.

IX.

The Court erred in giving instruction number XIV to the jury as follows:

"The Court further instructs you that the ordinary care which a youth of limited judgment and experience is called upon to exercise is not the same *quantum* of care which the adult would be called upon to use under the same circumstances. Each is required to use ordinary care, but the care which the person of mature intelligence and judgment must employ is different from the amount which the law exacts of a youth of immature age, judgment and experience."

As set forth in Exception No. X of the Bill of Exceptions.

X.

The Court erred in giving instruction number XV to the jury as follows:

"The burden of proof of contributory negligence is upon the defendant, to establish the same by a preponderance of the evidence, unless you find from

the plaintiff's own testimony, that he was guilty of contributory negligence."

As set forth in Exception No. XI of the Bill of Exceptions. [262]

XI.

The Court erred in giving instruction number XVI to the jury as follows:

"The Court further instructs you that plaintiff, although a minor, on entering defendant's employment, assumed all the ordinary risks of such employment which he fully knew, understood, comprehended and appreciated."

As set forth in Exception No. XII of the Bill of Exceptions.

XII.

The Court erred in giving instruction number XVII to the jury as follows:

"Whether or not plaintiff was guilty of contributory negligence, or whether or not his injuries resulted from the ordinary risks of his employment, which he assumed, are also issues which the Court submits to your determination without expressing any opinion thereon."

As set forth in Exception No. XIII of the Bill of Exceptions.

XIII.

The Court erred in giving instruction number XVIII to the jury as follows.

"If the evidence fails to satisfy you that the defendant is negligent in any of the particulars alleged in the complaint, or, if you find that defendant was so negligent, but the evidence fails to satisfy you,

that said negligence was the proximate cause of plaintiff's injuries, *of*, if you believe from the evidence, that plaintiff, prior to his injuries, knew of the unsafe condition of defendant's structures and machinery, which plaintiff claims caused said injuries, if they were unsafe, and fully understood, comprehended and appreciated the dangers incident to their use, and thereafter continued in defendant's employ, or, [263] if you believe from the evidence, that plaintiff was in any way negligent and that such negligence directly contributed to his injuries, your verdict will be for the defendant.

"If, however, you believe from the evidence, that the defendant was negligent as alleged in the complaint, and that said negligence was the proximate cause of plaintiff's injuries, without contributory negligence on his part, and without knowledge by him, prior to his injuries, of the unsafe condition of defendant's structures and machinery, or full understanding, comprehension and appreciation by him of the dangers incident to their use, your verdict will be for the plaintiff."

As set forth in Exception No. XIV of the Bill of Exceptions.

XIV.

The Court erred in giving instruction number XIX to the jury as follows:

"If you find for the plaintiff, it will be your duty to assess the amount of damages he is entitled to recover, and, in estimating these damages, you may consider his age, what, before the accident, was his health and physical condition, the extent to which the

injuries he received are permanent and will affect his health and physical condition in the future, and also his bodily pain and mental anguish, if any, which he has or will proximately—that is, naturally and without the intervention of some other cause—result from said injuries, and allow plaintiff such sum for damages as in your opinion will fairly compensate him for all of said injuries.”

As set forth in Exception No. XV of the Bill of Exceptions. [264]

XV.

The Court erred in refusing to give to the jury instruction No. I requested by the defendant, as follows:

“The jury are instructed that it was the duty of the defendant in this case to use only ordinary care in furnishing to the plaintiff at and before the time of the accident complained of, a reasonably safe place and reasonably safe surroundings in which to work, and to use reasonable care in maintaining and keeping such place in a reasonably safe condition.”

As set forth in Exception No. XVI of the Bill of Exceptions.

XVI.

The Court erred in refusing to give to the jury instruction No. II, requested by the defendant, as follows:

“Negligence on the part of defendant is not presumed. It is an affirmative fact which plaintiff must prove by a preponderance of the evidence, and the negligent acts proved, if any, must be such particular acts as are alleged in the plaintiff’s complaint. The

burden of proof is on the plaintiff, and if you find that the evidence bearing on the question of negligence on the part of defendant is evenly balanced, or that it preponderates in favor of the defendant, then and in that case the plaintiff cannot recover and your verdict must be for the defendant.”

As set forth in Exception No. XVII of the Bill of Exceptions.

XVII.

The Court erred in refusing to give to the jury instruction No. III, requested by the defendant, as follows:

“The defendant was under no obligation to keep the [265] plaintiff absolutely safe and free from danger, nor to insure the plaintiff against accident. His duty, to express it tersely, was to use ordinary care to secure the plaintiff’s safety. ‘Ordinary care,’ you are instructed is the care that is ordinarily exercised by a person of average prudence under the same or similar circumstances. Just what that degree of care is or would be, is for the jury to determine. Having determined what, under the circumstances would have been ordinary care, it is for you to say whether such care was exercised by the defendant about the premises in question.”

As set forth in Exception No. XVIII of the Bill of Exceptions.

XVIII.

The Court erred in refusing to give to the jury instruction No. IV requested by the defendant, as follows:

“The jury are instructed that the defendant was

not bound as an insurer to the absolute safety and suitability of the machinery and appliances furnished by it for use in its business, and that it was not bound to furnish the very best or most improved kind of machinery to be used at its mills. It was sufficient if the appliances connected with the same were reasonably safe and suitable for the purposes for which they were used.”

As set forth in Exception No. XIX of the Bill of Exceptions.

XIX.

The Court erred in refusing to give to the jury instruction No. V requested by the defendant, as follows:

“The Court instructs you that if you believe from the evidence that the plaintiff was not using ordinary care at the time and place of his injury and that his failure to [266] use such care directly contributed to cause his injury, then you will find for the defendant, and you are instructed that ordinary care is such care as would be used by an ordinarily prudent person under the same or similar circumstances.”

As set forth in Exception No. XX of the Bill of Exceptions.

XX.

The Court erred in refusing to give to the jury instruction No. VI requested by the defendant, as follows:

“You are further instructed that if there were any latent or obscure dangers or defects connected with the machinery in and about which plaintiff worked,

that it was then the duty of the defendant to explain such latent defects or obscure dangers to the plaintiff and warn him of the dangers connected therewith. But if you shall find from the evidence that the only dangers connected with the machinery around which plaintiff was employed, were in plain view, and were not in any respect hidden, and were such dangers that the plaintiff had full knowledge of and fully comprehended and appreciated, then and in such event no obligation existed on the part of the defendant to warn plaintiff of the danger of his employment and if injured under such circumstances then plaintiff cannot recover.”

As set forth in Exception No. XXI of the Bill of Exceptions.

XXI.

The Court erred in refusing to give to the jury instruction No. VII requested by the defendant, as follows:

“The jury are further instructed that if you find from the evidence that plaintiff was a minor on the 30th day of July, 1907, at the time he received the injuries complained [267] of and you should further find, from the evidence, that the dangers, if any, to which he was exposed in working on and about the push-table and carrying-table connected with defendant’s sawmill, were not concealed, but that plaintiff had full knowledge of and fully comprehended and appreciated the dangers incident to the ordinary use of the machinery, ways, appliances and structures with, upon or about which he was required to work, and with such knowledge and understanding contin-

ued in the employment of the defendant and continued in the use of such machinery, ways, appliances and structures, then and in that event the defendant was not required to warn the plaintiff of such dangers and the plaintiff thereby assumed the risks of his employment and is not entitled to a verdict against the defendant for damages growing out of his injuries sustained by reason of the accident set forth in the complaint.”

As set forth in Exception No. XXII of the Bill of Exceptions.

XXII.

The Court erred in refusing to give to the jury instruction No. VIII requested by the defendant, as follows:

“The proximate cause of an injury in a damage case is that cause which naturally led to and which by a prudent person might reasonably have been expected to be instrumental in producing the injury complained of. In determining whether a certain act is the proximate cause of any injury, the proper test is: ‘Was the injury complained of, of such a character as might reasonably have been foreseen, or reasonably have been expected to follow as the result of such an act.’ The rule of proximate cause has the same application in a damage suit in which a minor is plaintiff, as in the case of an adult.” [268]

As set forth in Exception No. XXIII of the Bill of Exceptions.

XXIII.

The Court erred in refusing to give to the jury instruction No. IX requested by the defendant, as follows:

“The jury are instructed that in the present action plaintiff seeks to recover damages by reason of certain injuries alleged to have been sustained by him and growing out of the alleged negligence of the defendant. Negligence which will entitle plaintiff to recover, and which plaintiff must prove before he will be entitled to a verdict, consists in the failure of the defendant to do that which a person of ordinary prudence and intelligence would do under the same or similar circumstances, or in the doing of that which a person of ordinary prudence or intelligence would not have done under the same or similar circumstances, and before you will be justified in returning a verdict for the plaintiff in this case, it will be necessary for you to find, from the evidence, that the defendant in the construction and operation of the machinery, ways, appliances and structures about which plaintiff was employed had omitted to take such precautions to prevent injury to the plaintiff, as an ordinarily prudent and intelligent person would have taken under the same or similar circumstances, or that defendant had done something which an ordinarily prudent and intelligent person would not have done under the same or similar circumstances.”

As set forth in Exception No. XXIV of the Bill of Exceptions.

XXIV.

The Court erred in refusing to give to the jury instruction No. X requested by the defendant, as follows: [269]

“The jury are instructed that if the defendant did

not know as a matter of fact that plaintiff was a minor at the time of his employment, or that the defendant was not in possession of facts and circumstances, from which it should have known that the plaintiff was a minor, then no greater obligation rested upon the defendant to warn the plaintiff of dangers that were apparent and were not concealed or hidden than there would have been to warn a man who had reached his majority. In taking into consideration the age of the plaintiff defendant had a right to rely upon the conduct and demeanor of the plaintiff, his size, appearance and ability to do a man's work."

As set forth in Exception No. XXV of the Bill of Exceptions.

XXV.

The Court erred in refusing to give to the jury instruction No. XI requested by the defendant, as follows:

"The jury are hereby instructed that if they shall find from the evidence that plaintiff had knowledge of the fact that there were two ways by means of which he could have climbed upon the push-table—the one way being to step over the spiked roller and the other way being to climb over the side of the push-table, by means of the lumber buggies; the first way being extremely dangerous and so known to him to be, and the other way safe and known by him to be so. And if you shall believe from the evidence that he voluntarily chose the dangerous way of going upon said push-table, when there was no occasion or necessity for so doing, and in so doing received the

injury of which he complains, that he cannot hold the defendant responsible for an injury which directly resulted from his voluntary and unnecessary choice of the more dangerous of the two ways of doing the work he [270] attempted to do.”

As set forth in Exception No. XXVI of the Bill of Exceptions.

XXVI.

The Court erred in refusing to give to the jury instruction No. XII requested by the defendant, as follows:

“The law requires of a minor suing for personal injuries, care and prudence equal to his capacity, and if you find from the evidence that the plaintiff in this action knew of the character of the machine which caused his injury and was aware of its dangerous character and carelessly and negligently tried to step over the spiked roller on to the push-table, so that his injury occurred or was inflicted without fault on the part of the defendant, then your judgment will be in favor of the defendant.”

As set forth in Exception No. XXVII of the Bill of Exceptions.

GIBSON, DUNN & CRUTCHER,
WRIGHT & WINNEK,

Attorneys for Defendant.

And upon the foregoing assignment of errors and upon the record in said cause, the defendant prays that said verdict and judgment may be reversed.

Dated February 24, 1914.

GIBSON, DUNN & CRUTCHER,
WRIGHT & WINNEK,

Attorneys for Defendant.

[Endorsed]: C. C. No. 1478. In the District Court of the United States, Southern District of California, Southern Division. H. C. McCann, by Jesse F. McCann, His Guardian *ad Litem*, vs. Benson Lumber Company, Defendant. Assignment of Errors. Filed Feb. 24, 1914. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, [271] Deputy Clerk. Gibson, Dunn & Crutcher, Entrance Room 718, Pacific Electric Building, Cor. 6th and Main Sts., Los Angeles, Cal., Attys. for Defendant. [272]

In the District Court of the United States, for the Southern District of California, Southern Division.

H. C. McCANN, by JESSE F. McCANN, His Guardian *ad Litem*,

Plaintiff,

vs.

BENSON LUMBER COMPANY, a Corporation,
Defendant.

Petition for Writ of Error and Supersedeas.

Defendant in the above-entitled cause, feeling itself aggrieved by the verdict of the jury and the judgment entered on the 18th day of September, 1913, comes now by Gibson, Dunn & Crutcher and Wright & Winnek, its attorneys, and files herewith an assignment of error and petitions said Court to allow said defendant to procure a writ of error to the Honorable The United States Circuit Court of Appeals for the Ninth Circuit, under and according to

the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which this defendant shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this Court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

GIBSON, DUNN & CRUTCHER,
WRIGHT & WINNEK,

Attorneys for Petitioner.

[Endorsed]: C. C. No. 1478. In the District Court of the [273] United States, Southern District of California, Southern Division. H. C. McCann, by Jesse F. McCann, His Guardian *ad Litem*, vs. Benson Lumber Company, Defendant. Petition for Writ of Error and *Supersedeas*. Filed Feb. 24, 1914. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Gibson, Dunn & Crutcher, Entrance Room 718, Pacific Electric Building, Cor. 6th and Main Sts., Los Angeles, Cal., Attys. for Defendant. [274]

*In the District Court of the United States, for the
Southern District of California, Southern Division.*

H. C. McCANN, by JESSE F. McCANN, His
Guardian *ad Litem*,

Plaintiff,

vs.

BENSON LUMBER COMPANY, a Corporation,
Defendant.

Order Allowing Writ of Error.

Upon motion of Gibson, Dunn & Crutcher, and Wright & Winnek, attorneys for defendant, and upon filing a petition for writ of error and an assignment of errors, it is ordered that a writ of error be and hereby is allowed to have reviewed in the Circuit Court of Appeals for the Ninth Circuit the verdict and judgment heretofore entered herein.

OLIN WELLBORN,

Judge.

[Endorsed]: C. C. No. 1478. In the District Court of the United States, Southern District of California, Southern Division. H. C. McCann, by Jesse F. McCann, His Guardian *ad Litem*, vs. Benson Lumber Company, Defendant. Order Allowing Writ of Error. Filed Feb. 24, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Gibson, Dunn & Crutcher, Entrance Room 718, Pacific Electric Building, Cor. 6th and Main Sts., Los Angeles, Cal., Attys. for Defendant. [275]

In the District Court of the United States for the Southern District of California, Southern Division.

H. C. McCANN, by JESSE F. McCANN, His Guardian *ad Litem*,

Plaintiff,

vs.

BENSON LUMBER COMPANY, a Corporation,
Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That we, Benson Lumber Company, a corporation, as principal, and the Aetna Accident & Liability Company, a corporation duly organized and existing under and by virtue of the laws of the State of Connecticut, duly authorized to execute bonds and undertakings and *supersedeas* bonds in the Federal Courts upon Writ of Error, are held and firmly bound unto H. C. McCann, in the sum of Sixteen Thousand One Hundred and Seventy-six and 44/100 Dollars, to be paid to the said H. C. McCann, plaintiff above named, to which payment well and truly to be made we bind ourselves and each of us, jointly and severally, and each of our successors, representatives and assigns, firmly by these presents.

Sealed with our seals and dated this 18th day of February, 1914.

AND, WHEREAS, the above-named defendant, Benson Lumber Company, has sued out a writ of error to the United States Circuit Court of Appeals, Ninth Circuit, to reverse a judgment in the above-entitled cause by the District Court of the United States for the Southern District of California, Southern Division, rendered in said cause on September 16th, 1913, and entered therein on September 18th, 1913. [276]

NOW, THEREFORE, the condition of this obligation is such that if the above-named defendant, Benson Lumber Company, shall prosecute said writ

to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

BENSON LUMBER COMPANY,

By J. CAMPBELL BLACK,

Manager.

AETNA ACCIDENT & LIABILITY COM-
PANY,

By C. S. VAN BRUNDT,

[Corporate Seal] Resident Vice-president.

By R. H. GARRISON,

Resident Assistant Secretary.

Affidavit.

State of California,

County of Los Angeles,—ss.

Personally appeared before me, C. S. Van Brundt, on the 18th day of February, one thousand nine hundred and fourteen, known to me to be the Resident Vice-president of The Aetna Accident and Liability Company, a corporation described in and which executed the annexed Bond of Benson Lumber Company, as surety thereon, and who, being duly sworn, deposes and says that he resides at Los Angeles, in the State of California; that he is the said Resident Vice-president of The Aetna Accident and Liability Company, and knows the corporate seal thereof; that the said company is duly and legally incorporated under the laws of the State of Connecticut, and duly licensed to transact its business in the State of California. That the

seal affixed to the annexed Bond of Benson Lumber Company, is the corporate seal of The Aetna Accident and Liability Company, and thereto affixed by order and authority of the Executive Committee of said company; and that he signed his name thereto by like order and authority as Resident Vice-president of said company; and that he is acquainted with R. H. Garrison, and knows him to be the Resident Assistant [277] Secretary of said company; and that the signature of said R. H. Garrison, subscribed to the said Bond is in the genuine handwriting of said R. H. Garrison, and was thereto subscribed in the presence of said deponent.

Sworn to, acknowledged before me, and subscribed in my presence this 18th day of February, 1914.

[Seal]

FLORENCE W. SAUNDERS,

Notary Public in and for the County of Los Angeles, State of California.

The foregoing bond, executed by the Benson Lumber Company as principal, but without the seal of said company attached thereto, and by the Aetna Accident & Liability Company, as surety, is acceptable to plaintiff both in substance and in form and may be filed and approved as a bond on writ of error out of the United States Circuit Court of Appeals for the Ninth Circuit.

HUNSAKER & BRITT and
HAINES & HAINES,

Attorneys for Plaintiff.

The within bond approved this 24th day of February, 1914.

OLIN WELLBORN,
District Judge. [278]

THE AETNA ACCIDENT AND LIABILITY
COMPANY,
HARTFORD, CONNECTICUT.

Certificate of Authority of Resident Vice-president.

KNOW ALL MEN BY THESE PRESENTS, That C. S. Van Brundt has been and is hereby appointed Resident Vice-president of The Aetna Accident and Liability Company, of Hartford, Connecticut, at Los Angeles, California, and as such Resident Vice-president has full power and authority to sign and execute, on behalf of The Aetna Accident and Liability Company, any and all bonds and undertakings and all bonds and undertakings signed by him, when sealed and attested by a Resident Assistant Secretary, shall be as valid and binding upon the Company as if said bonds and undertakings had been signed by the President and duly sealed and attested.

This appointment is made under and by authority of the following By-Law adopted by the Board of Directors of The Aetna Accident and Liability Company at a meeting duly called and held on the 28th day of December, 1911.

ARTICLE 8, RESIDENT OFFICERS, ATTORNEYS-IN-FACT AND AGENTS.

Section 1. The President, any Vice-president or the Secretary may from time to time appoint

Resident Vice-presidents, Resident Assistant Secretaries, Attorneys-in-Fact and Agents to represent and act for and on behalf of the Company and either the President, and Vice-president, the Secretary or the Board of Directors may at any time remove any such Resident Vice-president, Resident Assistant Secretary, Attorney-in-Fact or Agent, and revoke the power and authority given him.

Section 2. Resident Vice-presidents may, subject to the provisions and limits named in their certificate of authority, sign and execute on behalf of the Company any and all bonds and undertakings and other writings obligatory in the nature of a bond, [279] and may bind the Company thereby as fully and to the same extent as the President or any other Officer could bind it; such bonds and undertakings, however, to be attested in every instance by a duly appointed Resident Assistant Secretary.

IN WITNESS WHEREOF, The Aetna Accident and Liability Company has caused these presents to be signed by its Secretary, and its corporate seal to be hereto affixed, duly attested by its Assistant Secretary, this 7th day of January, A. D. 1914.

THE AETNA ACCIDENT AND LIABILITY COMPANY,

[Corporate Seal]

By J. S. ROWE,
Secretary.

Attest: DANIEL N. GILL (?)

Assistant Secretary.

State of Connecticut,
County of Hartford,—ss.

On this 7th day of January, A. D. 1914, before

me personally came J. S. Rowe, to me known, who, being by me duly sworn, did depose and say: That he resides in the city of Hartford, State of Connecticut; that he is the Secretary of The Aetna Accident and Liability Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

[Notarial Seal]

JAMES F. McEVITT,

Notary Public.

My commission expires Jan. 31, 1914. [280]

THE AETNA ACCIDENT AND LIABILITY
COMPANY,
HARTFORD, CONNECTICUT.

Certificate of Authority of Resident Assistant Secretary.

KNOW ALL MEN BY THESE PRESENTS,
That R. H. Garrison, has been and is hereby appointed Resident Assistant Secretary of The Aetna Accident and Liability Company, of Hartford, Connecticut, at Los Angeles, California, and as such Resident Assistant Secretary has power and authority to affix the seal of the Company to, and attest on behalf of the Company, any and all bonds and undertakings, and all bonds and undertakings sealed and attested by him, when signed by a duly appointed Resident Vice-president, shall be as valid and binding upon the Company as if said

bonds and undertakings had been sealed and attested by the Secretary.

This appointment is made under and by authority of the following By-law adopted by the Board of Directors of The Aetna Accident and Liability Company, at a meeting duly called and held on the 28th day of December, 1911.

ARTICLE 8. RESIDENT OFFICERS, ATTORNEYS-IN-FACT AND AGENTS.

Section 1. The President, and Vice-president or the Secretary may from time to time appoint Resident Vice-presidents, Resident Assistant Secretaries, Attorneys-in-Fact and Agents to represent and act for and on behalf of the Company, and either the President, any Vice-president, the Secretary or the Board of Directors may at any time remove any such Resident Vice-president, Resident Assistant Secretary, Attorney-in-Fact or Agent and revoke the power and authority given him.

Section 3. Resident Assistant Secretaries may, subject to the provisions and limits named in their certificate of authority, affix the seal of the Company to and attest on behalf of the Company any and all bonds and undertakings and other writings obligatory [281] in the nature of a bond, and may bind the Company thereby as fully and to the same extent as the Secretary or any other officer could bind it; such bonds and undertakings, however, to be signed and executed in every instance by a duly appointed Resident Vice-president.

IN WITNESS WHEREOF, The Aetna Accident and Liability Company has caused these presents to be signed by its Secretary, and its corporate seal to be hereto affixed, duly attested by its Assistant Secretary, this 7th day of January, A. D. 1914.

THE AETNA ACCIDENT AND LIABILITY COMPANY,

[Corporate Seal]

By J. S. ROWE,
Secretary.

Attest: DANIEL GILL (?)
Assistant Secretary.

State of Connecticut,
County of Hartford,—ss.

On this 7th day of January, A. D. 1914, before me personally came J. S. Rowe, to me known, who, being by me duly sworn, did depose and say: That he resides in the city of Hartford, State of Connecticut; that he is the Secretary of The Aetna Accident and Liability Company, the Corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

[Notarial Seal]

JAMES F. McEVITT,
Notary Public.

My commission expires Jan. 31, 1914. [282]

[Endorsed]: C. C. No. 1478. In the District Court of the United States, Southern District of California, Southern Division. H. C. McCann, by Jesse F. McCann, His Guardian *ad Litem*, Plaintiff,

vs. Benson Lumber Company, a Corporation, Defendant. Bond on Writ of Error. Filed Feb. 24, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Gibson, Dunn & Crutcher, Entrance Room 718, Pacific Electric Building, Cor. 6th and Main Sts., Los Angeles, Cal., Attorneys for Defendant. [283]

ORIGINAL.

In the District Court of the United States for the Southern District of California, Southern Division.

H. C. McCANN, by JESSE F. McCANN, His
Guardian *ad Litem*,

Plaintiff,

vs.

BENSON LUMBER COMPANY, a Corporation,
Defendant.

Praeipice for Record on Writ of Error.

To the Clerk of Said District Court:

You are hereby instructed to include in the record on writ of error in the above-entitled cause the following:

1. Writ of error.
2. Citation on writ of error and acknowledgment of service.
3. Petition for removal.
4. Bond on removal.
5. Original complaint.
6. Demurrer to original complaint.

7. Second amended complaint.
8. Answer to second amended complaint.
9. Verdict.
10. Judgment-roll and certificate thereto.
11. Bill of exceptions and order allowing same.
12. Stipulation filed on Nov. 20, 1913, making model of mill used as exhibit in this case part of transcript of record on writ of error.
13. Petition for writ of error and *supersedeas*.
14. Assignment of errors.
15. Order allowing writ of error and *supersedeas*.
16. Bond on writ of error. [284]

Dated, March 5th, 1914.

GIBSON, DUNN & CRUTCHER,
WRIGHT & WINNEK,

Attorneys for Plaintiff in Error.

[Endorsed]: C. C. No. 1478. In the District Court of the United States, Southern District of California, Southern Division. H. C. McCann, etc., Defendant in Error, vs. Benson Lumber Company, Plaintiff in Error, Defendant. Praecipe for Record on Writ of Error. Filed Mar. 5, 1914. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Gibson, Dunn & Crutcher, Entrance Room 718, Pacific Electric Building, Cor. 6th and Main Sts., Los Angeles, Cal., for Plaintiff in Error. [285]

ORIGINAL.

*In the District Court of the United States for the
Southern District of California, Southern Divi-
sion.*

H. C. McCANN, by JESSE F. McCANN, His
Guardian *ad Litem*,

Plaintiff,

vs.

BENSON LUMBER COMPANY, a Corporation,
Defendant.

**Stipulation [for Transmission of Certification and
Transmission of Exhibit III to Appellate Court.]**

WHEREAS, the parties to the action above-entitled have heretofore entered into a stipulation in words and figures, as follows:

“It is hereby stipulated that the model of a portion of the mill where plaintiff was hurt, which was used in evidence by both sides, for the purpose of illustration, may be considered as attached to the original Bill of Exceptions, as Exhibit No. III, without being physically attached thereto, and that if the defendant sues out and obtains a Writ of Error in the above-entitled action, that the clerk of the said District Court of the United States for the Southern District of California, Southern Division, may attach the said model to the original printed transcript of the record and cause the said model to be filed with the said original trans-

cript of record in the United States Circuit Court of Appeals for the Ninth Circuit.”

And, WHEREAS, the parties to the action above entitled have been advised by the clerk of said Court that owing to the size of said model it is impracticable to attach it or attempt to attach it to the original record to be transmitted by said Clerk to the United States Circuit Court of Appeals for the Ninth [286] Circuit;

NOW, THEREFORE, it is stipulated by and between the parties hereto that when the clerk in the above-entitled court transmits the original record to the United States Circuit Court of Appeals for the Ninth Circuit, he may also transmit to the Clerk of said Circuit Court of Appeals the model used in the trial of said action, and that said model need not be physically attached to the record, and that it shall be identified by a certificate of the clerk in the above-entitled District Court that it was the model used at the trial of the above-entitled action and that when so transmitted with such certificate and received by the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, shall be considered as a part of the record in such Circuit Court of Appeals the same as though physically attached to the Bill of Exceptions.

HUNSAKER & BRITT,

HAINES & HAINES,

Attorneys for Plaintiff.

WRIGHT & WINNEK,

GIBSON, DUNN & CRUTCHER,

Attorneys for Defendant.

[Endorsed]: No. 1478. In the District Court of the United States, Southern District of California, Southern Division. H. C. McCann, etc., Plaintiff, vs. Benson Lumber Company, Defendant. Stipulation for Transmission of Model of Mill as Exhibit. Filed Apr. 16, 1914. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Gibson, Dunn & Crutcher, Entrance Room 718, Pacific Electric Building, Cor. 6th and Main Sts., Los Angeles, Cal., for Defendant. [287]

[Certificate of Clerk U. S. District Court to Transcript of Record, etc.]

In the District Court of the United States in and for the Southern District of California, Southern Division.

C. C. No. 1478.

H. C. McCANN, by JESSE F. McCANN, His
Guardian *ad Litem*,

Plaintiff,

vs.

BENSON LUMBER COMPANY,

Defendant.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing two hundred and eighty-seven (287) typewritten pages, numbered from 1 to 287 inclusive, and comprised in one (1) volume, to be a full, true and correct copy of the Judgment-roll, Stipu-

lation of November 20, 1913, Bill of Exceptions (including Exhibits I and II), Assignment of Errors, Petition for Writ of Error and *Supersedeas*, Order Allowing Writ of Error, Bond on Writ of Error, Praecipe for Transcript and Stipulation for Transmission of Model of Mill as Exhibit filed April 16, 1914, in the above and therein entitled cause, and that the same together constitute the record in said cause as specified in the Praecipe filed in my office on behalf of the plaintiff in error by its attorneys of record, except Exhibit III, being said model of mill, which is separately transmitted to the United States Circuit Court of Appeals for the Ninth Circuit in accordance with the said Stipulation of counsel for the respective parties filed April 16, 1914.

I do further certify that the cost of the foregoing [288] record is \$162.45, the amount whereof has been paid me by the Benson Lumber Company, the plaintiff in error in said cause.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this 17th day of April, in the year of our Lord, one thousand nine hundred and fourteen, and of our Independence, the one hundred and thirty-eighth.

[Seal]

WM. M. VAN DYKE,

Clerk of the District Court of the United States of America, in and for the Southern District of California. [289]

[Endorsed]: No. 2410. United States Circuit Court of Appeals for the Ninth Circuit. Benson Lumber Company, a Corporation, Plaintiff in Error, vs. H. C. McCann, by Jesse F. McCann, His Guardian *ad Litem*, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Southern District of California, Southern Division.

Received and filed April 21, 1914.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Benson Lumber Company, a corporation,

Plaintiff in Error,

vs.

H. C. McCann, by Jesse F. McCann, his Guardian ad Litem,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

Filed

OCT 7 - 1914

E. D. Monckton,
Clerk.

GIBSON, DUNN & CRUTCHER,
By NORMAN S. STERRY;
WRIGHT & WINNEK,
By LEROY WRIGHT,
Attorneys for Plaintiff in Error.

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United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Benson Lumber Company, a corporation,

Plaintiff in Error,

vs.

H. C. McCann, by Jesse F. McCann, his Guardian ad Litem,

Defendant in Error.

BRIEF.

STATEMENT OF THE CASE.

The above action was originally brought in the Superior Court of the state of California, in and for the county of San Diego, by the defendant in error as plaintiff, against the plaintiff in error, as defendant. Because of the diverse citizenship of the parties, the cause was removed to the Circuit Court of the United States, Ninth Circuit, in and for the Southern Division of the Southern District of California. The suit was to recover for personal injuries sustained by the defendant in error, on or about the 30th day of July, 1907, while employed in the saw mill of the plaintiff in error.

The cause was tried upon the second amended complaint and an amended answer and an amendment to said answer. The second amended complaint is to be found in transcript of record, pp. 43 to 51, and the answer thereto on pp. 68 to 82.

In brief, the defendant in error alleged that at the time of the accident he was seventeen years of age and was employed in the mill of the plaintiff in error, loading lumber; that the said lumber was carried from a trimmer onto a carrying table and also a push table; that it was part of the duty of the defendant in error, whenever there was a jam of lumber to go upon the push table and clear away the jam, that the only means provided by the plaintiff in error for going upon the push table was over a dog roller; that the said place at which the defendant in error was required to work was dangerous, defective and unsafe; that the way to the push table over the dog roller was dangerous and unsafe; that there were not sufficient skids furnished and that lumber, therefore, become clogged and necessitated the defendant in error going upon the push table; that the defendant in error, through his youth and lack of experience, did not understand or appreciate the danger to which he was exposed, and that the plaintiff in error negligently failed to warn him thereof; the amended answer of the plaintiff in error, in the main, admitted the construction of the mill as described in the second amended complaint, but traversed all of the allegations of negligence; denied that the defendant in error was required or expected to go upon the push table, or that

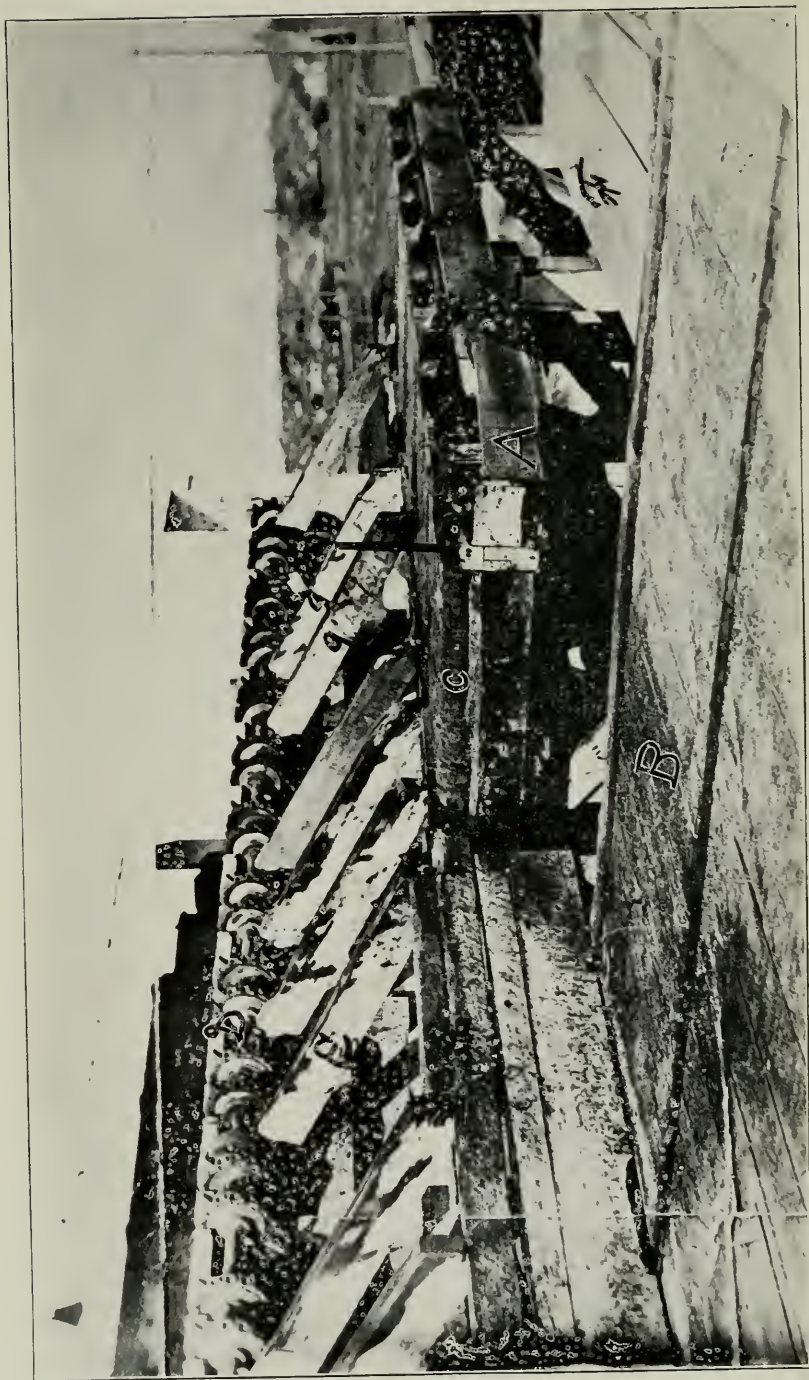
the only means of going there was over the dog roller, and alleged that other, better and safer means were provided by the plaintiff in error for its employees to mount the push table, when it was necessary so to do.

In addition to the denials, of the answer, it was affirmatively alleged that the defendant in error contributed to his injuries by his own want of ordinary care and caution, and further that if any person other than the defendant in error was negligent, the negligence was that of a fellow servant and employee, and that the defendant in error was injured as the result of an open, apparent and obvious risk, and that prior to his receiving said injuries the defendant in error knew, or by the exercise of ordinary care upon his part, should have known of the dangers incident to his work, and that he assumed the risk of his injury.

Upon the issues thus formed, a trial was had by a jury which resulted in a verdict in favor of the defendant in error for eight thousand dollars and costs.

At the trial of the cause, there was introduced and used by both sides, a model of the portion of the mill where the accident occurred. [Transcript of Record, p. 94.] This model was drawn to the scale of one inch to the foot. [Trans. of Record, p. 174.] Owing to the size of the model, it was found physically impossible to attach the same to the original bill of exceptions. By stipulation of the parties the model was sent by the clerk of the District Court to the clerk of this Honorable Court, under the certificate of the said clerk of the District Court that the same was the model used at the

trial of said cause. [Trans. of Record, pp. 89, 296 and 297.] We feel certain that an examination of this model will materially assist the court in understanding the physical conditions of the mill at the time of the accident and our statement and discussion of the cause. In addition to the exhibit, the defendant in error, as a part of his case, introduced as defendant's in error Exhibit No. I, a diagram prepared by himself, of the portion of the mill where he was hurt; and as Exhibit No. II, a photograph of the same portion. [Trans. of Record, pp. 262-263.] For the convenience of the court, we here attach a copy of the drawing and of the photograph. The lettering on the original sketch is very plain, but is somewhat dim on the photograph, and we have taken the liberty of etching the letters, on the copies here attached, so as to make them perfectly plain, but their position is the same as on the originals.



At the time of the accident the plaintiff in error was engaged in sawing lumber. After the lumber was cut in appropriate lengths it was passed from the trimmer over the gears marked "D" down the skids which are shown both in the photograph and the diagram, and marked "G." The lumber was supposed to strike the carrying-table, which is marked "B." Through this carrying-table there were endless chains or bands of steel which were kept constantly in motion and which carried the lumber forward. A portion of the lumber would fall upon the push-table. There were a number of iron rollers in the push-table and at the southerly end, or the end next to the carrying-table, was a dog-roller which was the same as the rollers in the push-table, except it was armed with a series of teeth or spikes which were about one inch or one and a quarter in length. These rollers revolved at the rate of one hundred to one hundred and fifty revolutions a minute, their object being to propel any lumber that fell upon the push-table over onto the carrying-table. The table marked "F" was considerably below the carrying-table and on it the men stood who loaded the lumber, one of which was the defendant in error. It was their duty when the lumber reached them to remove it from the carrying-table and pile it upon the carts.

The mill was first constructed without any push or carrying-tables, the lumber being sent from the trimmer over skids to the ground. The defendant in error had been employed a week or two before these tables were constructed and then had been laid off for a week or ten days while the carrying-table and push-table were erected. After they had been in operation he had

worked about two weeks before the accident. The testimony at the trial showed that after the accident there were several changes made in the construction of both tables. The carrying-table was lowered and lengthened. At the time of the accident in front of the dog-roller was a board which is marked upon the model as "X," and is referred to throughout the testimony as the "X board." It is not shown in the photograph for the reason that it had been removed before the picture was taken. The defendant in error offered testimony showing that the "X board" was removed the day after the accident on order of the superintendent. The testimony of the plaintiff in error tended to show that after the accident the board was broken by some lumber striking it and was removed on that account. Whatever was the cause of the removal of the board, the record clearly shows that at the time of the accident the board was in front of the roller and extended to about an inch of its top. This was doubtless put there to keep the clothes of the workmen from being caught in the revolving teeth of the roller. Between the loading-table, which is marked "F," and the push and carrying-tables, was another little platform, or step, which does not show in the photograph, but which is shown on the plat and marked "P." The push-table was two feet higher than the carrying-table, and the distance over the dog-roller was one foot and nine inches. [Trans. of Record, p. 152.]

When the defendant in error first entered the mill he undertook to study the machinery and become familiar with it, and as part of his case in chief he gave an

accurate and detailed account of the operation of the whole mill.

There was nothing obscure about any of the machinery where he was injured. All of the rollers in the push-table, including the dog-roller, the gears on the trimmer and the endless bands in the carrying-table were open and apparent to anyone.

When the mill was in operation great quantities of lumber came over the trimmer onto the push and carrying-tables and the work of the men in handling this lumber was very strenuous; also, there was so much noise made by the machinery that the man who operated the trimmer could not hear any verbal directions from the men who were on the loading-table, but they could, and frequently did, stop the operation of the mill by giving him some signal with the hand or arm.

The defendant in error, at the time of the accident, was seventeen years of age, but he was man grown, weighing about one hundred and forty pounds; was the most active of all of the men in his gang and the testimony of both sides shows that he performed as much, if not more, labor than any of the other workmen. There is not a suggestion in the record that at the time of his employment any officer or agent of the plaintiff in error knew, or had any reason to suppose, that he was a minor.

During the work it would often occur that there would be a jam or, as one of the witnesses expressed it, a glut of lumber upon the push-table. Often a piece of lumber would fall between the skids and so block the progress of other lumber. It was necessary, when this

condition arose, to remove the cause of the jam. The defendant in error had been furnished with a pickaroon, which was a sharp hook on a long pole, but he did not like the one furnished and had made one for himself with a longer handle. The accident happened shortly after two o'clock in the afternoon. The defendant in error had used his pickaroon in the morning, but on returning from lunch had not seen it and was unable to state where it was.

He testified in his own behalf that soon after the push and carrying-tables had been first installed, that Mr. Kilty, the foreman, had seen a jam of lumber upon the push-table and had ordered him (defendant in error) to go upon the table and clear it off and that in the presence of Mr. Kilty he had mounted on the push-table by going upon the carrying-table and then stepping from the carrying-table across the dog-roller and that thereafter whenever a jam or glut of lumber occurred he had generally gone upon the push-table in that manner; that he had gone on the push-table over the dog roller once or twice before the time Kilty had ordered him to go upon the push-table [Trans. of Record, p. 126], and that he had gone upon it many times without accident or injury; that when going upon it he had seen and knew that lumber was coming upon it in a continuous stream and that he knew the dog-roller and the other rollers in the push-table were revolving and that the endless steel bands in the carrying-table were in motion. He further testified that he had always been able to step across the dog-roller with safety prior to the time of his injury; that he had occasionally seen other workmen go onto the push-table over the dog-

roller; that as a general rule there were lumber buggies piled with lumber standing alongside of the loading-table; that a workman on the loading-table could mount to the push-table with safety on one of these lumber buggies without stepping over the dog-roller; that at the time of the accident there was a lumber buggy there but that he did not try to go up on it for the reason that he had the impression that it was either piled too high or too low with lumber [Trans. of Record, pp. 145-146], that the most convenient way was to step over the dog-roller when the machinery was running; that he knew that in doing so he had to watch out to prevent being struck by lumber [Trans. of Record, p. 142]; that he did not know exactly why he did not go on the table by way of the trucks on the day of the injury. [Trans. of Record, p. 145.]

Again looking at the photograph, marked Plaintiff's Exhibit No. II, it will be seen that there is an iron pipe or stem at the southeast corner of the push-table. The defendant in error was not certain whether he could have taken hold of that and climbed up that way onto the push-table or not.

On behalf of the plaintiff in error, Mr. Kilty, its foreman, testified that he had never seen the defendant in error, or any other person, stepping over the dog-roller; that one day he saw the defendant in error up on the push-table and that he called him down immediately; that he often told him to come down and to stay on the loading-table; that men who were loading lumber were not expected or required to go upon the push-table and that he had never ordered the defendant in

error to go there; that the Benson Lumber Company's mill was an Allison mill plan and that the loading and push-tables were the type used in that style of mill; that he had not told the defendant in error to watch out against being hurt by a revolving shaft because he would consider it an insult to tell anyone to watch out for such an open danger.

Mr. Coffin, who was a fellow employee of the defendant in error at the time of the accident, also testified that he had warned him about getting upon the carrying-table and had told the defendant in error that he would get hurt there; that he (Coffin) had never seen the defendant in error, or anyone else, get on the push-table over the dog-roller.

Mr. Kilty also testified that no matter how high the lumber buggies were loaded, the defendant in error, or other workmen, could safely go over them to the push-table providing the buggies were properly loaded.

The defendant in error denied having been warned either by Coffin to stay off the carrying-table, or by Kilty to keep off the push-table.

At the time of the accident the plaintiff and one Mr. Coffin were working side by side on the loading-table. A board, in coming from the trimmer, fell between the skids and would have caused a jam of lumber if it had not been removed. Coffin saw this and started to signal the trimmer to stop the machinery. Before he could do so the defendant in error sprang to the carrying-table and attempted to step across the dog-roller onto the push-table; in doing so his foot was caught in some way between the "X board" and the dog-roller and was

so badly crushed that it had to be amputated. The witness Coffin was under the impression that a piece of timber struck his foot, but this was only an impression. The defendant in error did not know how his foot came to be caught, being unable to state whether he missed his footing or whether his foot slipped as he was stepping over the roller. He did testify, however, that there was no lumber coming onto either table at the time he attempted to cross over the dog-roller, and he admitted that he started towards the push-table as soon as he saw the board drop between the skids; that he did not tell anyone of his intention and made no attempt to have the machinery stopped, did not speak to anyone and was not asked to go upon the push-table.

We believe the foregoing to be a fair outline of the evidence.

Both sides having rested, the plaintiff in error (defendant below) moved the Honorable District Court to direct the jury to return a verdict in favor of the defendant. (The reasons for the said motion are set forth in full in specification of errors No. 1, *post*, pages 18 and 19.)

This motion was denied, the learned court submitting to the jury the question of negligence of the plaintiff in error and of the defendant in error, and also whether the defendant in error assumed the risk of his injury.

Questions Raised by the Writ of Error.

In the assignment of errors filed in the record, pages 265 to 282, there are twenty-six separate assignments of error. We believe each well taken, but to discuss all would unnecessarily prolong the brief; also, a number of errors can be discussed together instead of under separate heads. The questions, therefore, to which we shall now confine ourselves are:

I.

Did the learned District Court err in denying the motion of the plaintiff in error for directed verdict?

(a) Did the defendant in error, as a matter of law, assume the risk of his injury?

(b) As a matter of law, was the defendant in error guilty of contributory negligence?

II.

Did the court err in giving the jury, on its own motion, instruction No. V, wherein the court charged the jury that a servant did not assume a risk arising from the negligence of the employer in not providing or maintaining a safe place in which to work?

III.

Did the court err in giving to the jury, on its own motion, instructions numbered VI and VII, where the court told the jury that in order for the defendant in error to assume the risk of his injury he must have actual knowledge of the danger incident to his work, and eliminated entirely the question of whether the defendant in error should have known of the danger by the exercise of ordinary care; further, by instruction

No. VII, charged the jury that the negligence of the plaintiff in error could be determined by reference to whether the defendant in error understood the danger of his situation.

IV.

Did the court err in refusing instruction No. VI, requested by the plaintiff in error, to the effect that it was not required to instruct the defendant in error as to any open and apparent dangers, and did the court further err in giving, on its own motion, instruction No. VIII wherein the jury were told that if the defendant in error did not fully appreciate the danger incident to his work that it was the duty of his employer to fully explain and warn him thereof (although the evidence showed that the dangers were perfectly apparent, open and obvious and that no reasonable man could have expected or assumed that the defendant in error did not fully appreciate and understand the dangers)?

V.

Did the court err in refusing to give instruction No. VIII, requested by the plaintiff in error, to the effect that the proximate cause of an injury is that cause which could have been reasonably foreseen as liable to produce an injury?

VI.

Did the court err in refusing to give instruction No. XI, requested by the plaintiff in error, to the effect that if there were two ways for the defendant in error to reach the push-table, one safe and the other dangerous, and the defendant in error voluntarily chose the dangerous way he could not recover?

SPECIFICATION OF ERRORS.

I.

The court erred in denying the motion of the defendant (plaintiff in error here) to direct the jury to return a verdict in favor of said defendant, as set forth in exception No. II [pp. 230-231, bill of exceptions], which said motion was as follows:

“Both sides having rested, the defendant then and there moved the said court to direct the jury to return a verdict in favor of the said defendant upon the following grounds:

“1. There was no evidence proving or tending to prove any negligence on the part of the defendant.

“2. There was no evidence proving or tending to prove that negligence, if any, upon the part of the defendant contributed directly or proximately, or at all, to the injuries sustained by the plaintiff.

“3. That it affirmatively appeared from the evidence that the plaintiff himself was guilty of negligence, that is that said plaintiff did not exercise ordinary care or caution for his own safety and protection, and that the failure upon the part of the plaintiff to exercise ordinary care and caution for his own safety and protection contributed directly and proximately to the injuries sustained by him.

“4. It affirmatively appeared from the evidence that the injuries sustained by plaintiff were the result of a risk assumed by him in the usual course of his employment; that the dog or spike-roller was open, apparent and obvious and the danger of attempting to climb to the push-table or go to the push-table across said roller

was an open and obvious risk of which plaintiff fully knew, comprehended and understood and appreciated, or should have, by the exercise of ordinary care on his part, have fully known, comprehended and understood and appreciated. Plaintiff was not injured by reason of any concealed or latent danger but was injured as a result of a danger which was open and obvious and of which plaintiff fully knew and realized, comprehended and understood, or of which he should have fully known, realized, comprehended and understood had he exercised ordinary care for his own safety and protection.”

II.

The court erred in giving instruction No. V to the jury as follows:

“The court instructs you, that an employer is not to be held as guaranteeing or insuring the absolute safety of the employee, or the place in which he is to work, but it is the duty of the employer to exercise reasonable care in providing and maintaining a safe place for the employee to work and sufficient and safe material, appliances and other means, by which the service is to be performed. Furthermore, this duty of the employer to exercise reasonable care for the employee cannot be delegated to a servant so as to exempt the former from liability for injuries caused to another servant by its omission. The servant does not undertake to incur the risk arising from negligence in providing or maintaining a safe place in which he is to work, or suitable and safe appliances, or other means with which his service is to be performed. His contract implies that, in regard

to these matters, his employer will exercise reasonable care in making adequate provision that no danger shall ensue to him, and he has a right to assume and rely and act upon the assumption, that such care has been exercised.”

As set forth in exception No. IV of the bill of exceptions, on pp. 233-236, Trans. of Record.

III.

The court erred in giving instruction No. VI to the jury as follows:

“The court further instructs you, that, if the place where plaintiff was working and the machinery with which he worked at the time of the accident were unsafe, as alleged in the complaint, but plaintiff knew them to be unsafe, and fully understood, comprehended and appreciated the dangers incident to their use, then defendant would not be chargeable with negligence in assigning him to the work in which he was engaged when injured.”

As set forth in exception No. V of the bill of exceptions, on pp. 263 and 267, Trans. of Record.

IV.

The court erred in giving instruction No. VII to the jury as follows:

“The court further instructs you, that, at the time plaintiff was injured, there was in force a statute of California which contains the following provision:

“ ‘Knowledge by an employee injured of the defective or unsafe character or condition of any machinery, ways, appliances or structures of such employer, shall

not be a bar to recovery for any injury or death caused thereby, unless it shall also appear that such employee fully understood, comprehended and appreciated the dangers incident to the use of such defective machinery, ways, appliances or structures, and therefore consented to use the same or continued in the use thereof.'

"This statute applies to the consideration by you of the entire evidence in its bearing upon the allegations of the complaint charging the defendant with negligence, and the allegations of the answer denying the negligence so charged and charging the plaintiff with negligence, and with having assumed the risk incident to the business and work in which he was employed and with having contributed to his alleged injury by his own concurring negligence."

As set forth in exception No. VI of the bill of exceptions, on pp. 237-238, Trans. of Record.

V.

The court erred in giving instruction No. VIII to the jury as follows:

"The court further instructs you, that, in passing upon the question whether plaintiff did fully understand, comprehend and appreciate the dangers incident to the place where and the machinery with which he was working, it is proper for you to consider, with all the other evidence, the evidence as to the age, experience, and maturity of judgment of the plaintiff at the time the injury was received.

"Where a master employs a servant to do dangerous work, or to do work that must necessarily require him

to move in and about moving machinery of a dangerous nature, who, from youth, inexperience, ignorance or want of capacity may fail to appreciate the danger surrounding him by such work, and the master knows, or by the exercise of ordinary care, could know, of the servant's failure to appreciate the danger incident to his work, it is a breach of duty for the master to expose such servant, even with his own consent, to such danger, or to place him in a position where it shall become necessary for him to encounter the same, without first giving him such full and complete instructions as will enable him to fully and completely comprehend them and to do the work safely and with proper care on the servant's part."

As set forth in exception No. VII of the bill of exceptions, pp. 238-239, Trans. of Record.

VI.

The court erred in refusing to give to the jury instruction No. VI requested by the defendant, as follows:

"You are further instructed that if there were any latent or obscure dangers or defects connected with the machinery in and about which plaintiff worked, that it was then the duty of the defendant to explain such latent defects or obscure dangers to the plaintiff and warn him of the dangers connected therewith. But if you shall find from the evidence that the only dangers connected with the machinery around which plaintiff was employed, were in plain view, and were not in any respect hidden, and were such dangers that the plaintiff had full knowledge of and fully comprehended and

appreciated, then and in such event no obligation existed on the part of the defendant to warn plaintiff of the danger of his employment and if injured under such circumstances then plaintiff cannot recover.”

As set forth in exception No. XXI of the bill of exceptions, pp. 254-255.

VII.

The court erred in refusing to give to the jury instruction No. VIII requested by the defendant, as follows:

“The proximate cause of an injury in a damage case is that cause which naturally led to and which by a prudent person might reasonably have been expected to be instrumental in producing the injury complained of. In determining whether a certain act is the proximate cause of any injury, the proper test is: ‘Was the injury complained of, of such a character as might reasonably have been foreseen, or reasonably have been expected to follow as the result of such an act.’ The rule of proximate cause has the same application in a damage suit in which a minor is plaintiff, as in the case of an adult.”

As set forth in exception No. XXIII of the bill of exceptions, p. 256.

VIII.

The court erred in refusing to give to the jury instruction No. XI requested by the defendant, as follows:

“The jury are hereby instructed that if they shall find from the evidence that plaintiff had knowledge of

the fact that there were two ways by means of which he could have climbed upon the push-table—the one way being to step over the spiked-roller and the other way being to climb over the side of the push-table, by means of the lumber buggies; the first way being extremely dangerous and so known to him to be, and the other way safe and known by him to be so. And if you shall believe from the evidence that he voluntarily chose the dangerous way of going upon said push-table, when there was no occasion or necessity for so doing, and in so doing received the injury of which he complains, that he cannot hold the defendant responsible for an injury which directly resulted from his voluntary and unnecessary choice of the more dangerous of the two ways of doing the work he attempted to do.”

As set forth in exception No. XXVI of the bill of exceptions, pp. 258-259.

ARGUMENT.

I.

The Court Erred in Denying the Motion of the Plaintiff in Error to Direct a Verdict Against the Defendant in Error and in Favor of the Plaintiff in Error.

The refusal to direct a verdict in favor of the plaintiff in error is the first specification of error herein (see pp. 18-19, *ante*), and is the first assigned error in the assignment of errors. [Trans. of Record, pp. 265-267.]

We feel that it is a very debatable question whether there was any evidence to warrant the implied finding of the jury that the plaintiff in error was guilty of negligence. We do not discuss that issue, however, for the reason that we believe that it is clear, beyond a peradventure of a doubt, that the evidence most favorable to the defendant in error shows that he assumed the risk of his injury and that he contributed to his injury by his own negligence. If either proposition can be established, as a matter of law, the court erred in not directing a verdict in favor of the plaintiff in error.

Although the defenses of assumed risk and contributory negligence are often spoken of as synonymous, and the evidence which establishes one, frequently establishes the other, still, they are separate, distinct defenses.

Assumption of risk is said to be a matter of contract. It is acquiescence by an employee to known dangers or such as an ordinarily prudent man ought to have known and appreciated. An employee consenting to work in the presence of such dangers, either expressly

or impliedly, assumes the risk as one of the terms of his contract of employment. The revolving dog-roller with its projecting teeth of steel was from necessity an open and apparent danger which defendant in error assumed when under his contract of employment he began and continued to work about it. He assumed the risk of the very injury he sustained.

Contributory negligence is said to arise from tort; it springs from the conduct of the injured employee. If the danger is open, apparent and appreciated, and by reason of his failure to exercise ordinary care the employee is injured, he cannot recover, for by his fault he contributed to the injuries sustained. If an ordinarily prudent person would not, under all the circumstances, have done what defendant in error did, then by his conduct he contributed to the injury sustained and cannot recover.

The movements of the body are controlled by the mind. Men think, then act. An employee who is engaged in the presence of dangerous machinery and acts without thinking when he should have thought and is thereby injured by an open and apparent hazard, falls far short of ordinary care. If thinking, he was injured, he assumed the risk; if neglecting to think, he was injured, he is charged with contributory negligence.

We will consider each defense under a separate sub-head, and we will consider separately the question of whether the defendant in error assumed the risk of his injury, or whether he was guilty of negligence contributing thereto.

A.

THE DEFENDANT IN ERROR WAS INJURED AS A RESULT OF A RISK WHICH HE ASSUMED AND HE THEREFORE CANNOT RECOVER, AND THE LEARNED DISTRICT COURT ERRED IN DENYING THE MOTION OF THE PLAINTIFF IN ERROR FOR DIRECTED VERDICT.

Prior to March, 1907, section 1970 of the Civil Code of California read:

“An employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business.”

It will be observed that this was but a statutory declaration of the rule of the common law relative to the relation of master and servant. It was deemed advisable to modify the common law rule with relation to the defense of the negligence of a fellow servant and in March, 1907, section 1970 of the Civil Code was amended as follows:

“An employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless the negligence causing the injury was committed in the performance of a duty the employer owes by law to the employee, or unless

the employer has neglected to use ordinary care in the selection of the culpable employee; provided, nevertheless, that the employer shall be liable for such injury when the same results from the wrongful act, neglect or default of any agent or officer of such employer, superior to the employee injured, or of a person employed by such employer having the right to control or direct the services of such employee injured, and also when such injury results from the wrongful act, neglect or default of a co-employee engaged in another department of labor from that of the employee injured, or employed upon a machine, railroad, train, switch signal point, locomotive engine, or other appliance than that upon which the employee is injured is employed, or who is charged with dispatching trains, or transmitting telegraphic or telephonic orders upon any railroad, or in the operation of any mine, factory, machine shop, or other industrial establishment.

“Knowledge by an employee injured of the defective or unsafe character or condition of any machinery, ways, appliances or structures of such employer shall not be a bar to recovery for any injury or death caused thereby, unless it shall also appear that such employee fully understood, comprehended and appreciated the dangers incident to the use of such defective machinery, ways, appliances or structures, and thereafter consented to use the same, or continued in the use thereof.”

It will be noticed that the section as it had stood for years was re-enacted without change. The amend-

ments, added, simply modified the common law rule in relation to the defense of a fellow servant. As we shall hereafter show, the declaration in the second paragraph of the statute as amended, did not attempt to change or modify the rule of the common law with relation to the defenses of assumed risk and of contributory negligence. Indeed, the Supreme Court of California has twice expressly so held.

See

Bresette v. E. B. & A. L. Stone Co., 162 Cal.
74, 80;

Hall v. Clark, 163 Cal. 392, 395-396.

The amendment to the statute was merely a legislative declaration of the judicial interpretation of the common law with reference to the defense of assumed risk. Prior to 1907 it had never been the law that a servant was barred from recovery because of any defect in ways, machinery or structures with which or about which he was required to work unless he appreciated the danger incident thereto, or should, by the exercise of ordinary care upon his part have appreciated it.

See

Sanborn v. Madera Flume etc. Co., 70 Cal. 261,
267-268;

Nofsinger v. Goldman, 122 Cal. 609, 618;

Pigeon v. Fuller, 156 Cal. 691, 697;

St. Louis Cordage Co. v. Miller, 126 Fed. 495,
511.

Indeed, the very doctrine of the assumption of risk was founded upon the fact that the servant knew of the danger and the risks incident thereto, or by the exercise of ordinary care should have had such knowledge and by accepting the employment impliedly consented to assume the risk.

At the trial of this case counsel for defendant in error contended, and the learned District Court held, that the second paragraph of the amendment of 1970 had engrafted a new rule of law upon the relationship of master and servant and had, to a considerable extent, modified the defense of assumed risk.

As we have heretofore pointed out, and will hereafter show at length by quotations from decisions of the Supreme Court of California (pages 47-54, *post*), the amendment did not change the rule relative to assumed risk.

Accepting, however, for the moment, the contention advanced in the District Court by learned counsel for defendant in error, that the amendment had made a change in the law, still, we assert that under the most liberal interpretation that can be given to section 1970, the defendant in error must be held to have assumed the risk of his injury. To demonstrate this it is but necessary to quote from his testimony. On cross-examination he stated:

“I have not been in the mill since this accident. I have testified about the way the machinery [124] was operated; those were all things that I knew myself; I knew myself in a general way how the mill was run, and knew how the machinery was operated; I never had any experience before this. When I went to work there,

I studied the machinery and went to the man in charge of it whenever I didn't understand something about it, so that I understood the general operation of the mill." [Trans. of Record, p. 128.]

With this statement borne in mind, the testimony on direct examination and cross-examination shows beyond question that he knew everything about the operation of the mill from the time the log was taken out of the water until it was loaded by himself and fellow employees.

We quote from his direct examination (*italics throughout testimony are our own*):

"I will tell you what I know of the way the mill operated from the time the log was dragged from the bay onto the big log-carrier until the lumber was delivered over [93] this trimmer. The log was put on the main carriage that is up on the mill, to saw all the lumber. It carried it back and forth past a band saw. As it sawed off each slab of boards, whichever happened to come first, it was dragged down on to a carrier. That mechanism is not represented here at all, it is away up in the fore part of the mill. I am demonstrating from the south end, which was at the bay where the logs come up from the bay. The mill was on the west side of all that is represented here. These posts here are the mill posts of the east wall, and the mill itself is on the west side of what would be this model. That was the mill for sawing these logs into lumber. Each time this carriage would come past the band saw, it would saw off a board. The carriage would move rapidly or slowly, it was under the control

of the sawyer. Then the boards would drop on to a push-table which would push them longways. That is not this push-table, it is another one in the mill. It would push them endways until they came to the edge of the table where they were shoved off sideways to the edger, then they would drop down on to a carrier-table and carried east to the trimmer. And the trimmer was located right directly there, as though you inclined a place from the east side of the mill at an angle of some degrees downward and inward of the mill which was in the neighborhood of 30 feet long and 12 feet wide. That had saws in, directly every two feet, so they could put a board on there the full length of the trimmer and cut it up into two-foot lengths in one cut, and various places they would saw in between, which would make it a foot, so this was all controlled by the trimmer. They had a number of saws so it could be cut [94] into two-foot lengths, but each saw was controlled by the trimmer. The business of the trimmer is to operate all these saws, he controls all the saws; by raising them up into the table, they would be in position to saw, and by lowering them, they would be below the surface of the table and would not saw. The saws were worked by the trimmer pressing down on his foot with treadles. There was one saw about every two feet, and if I remember right, in various places, one to every foot. The saws were operated according to the size the boards would have to be trimmed up to. The size of the boards were generally from six feet long to the full length of the table, governed by the condition the board was in. He used the lumber that came to him to the best advantage to make the most lumber out of. When the

lumber got to the west side of the trimmer table it continued to move upward and eastward until it got to the upper edge of the trimmer, the east end of the trimmer and the east wall of the mill. Then it dropped on the skids. I will mark the skids 'E' on the model. * * *

"The skids were out as far as the [95] trimmer went, leading on to this carrying-table. The skids extended the whole length of the trimmer, but that is not shown in this model. * * *

"After the lumber was put on to the table once, there was a continuous passage from that on until it was dumped on these skids; the lumber did not stop after that, it was carried according to the cut he had made on the board, where it would light. If it was an extra long board it would drop on this table, the push-table, Table A, and by the process of these rollers on the table. These rollers were about six-inch rollers, 4 feet long, revolving towards the south. The four to the north were smooth. The last roller on the south of the push-table was what is termed as a dog-roller. It was of the same size as the other rollers, only for the projections quite thickly of steel projecting at various lengths, and pieces of steel like bars would be in there. This part that was removed was about from the dog-roller around in the neighborhood of an inch and a half, maybe a little over, or maybe a little less. * * *

"In the further operation of the mill, supposing it to be in full operation, [96] these bands on the carrying-table represent endless chains. There are four or five of them and they moved eastward at right angles eastward from the movement of the lumber from the push-table.

The lumber from the push-table came on to the carrying-table at the same time the lumber was coming from the trimmer on to the carrying-table. The two streams of lumber came together there on the carrying-table.

* * *

“In the model, the wire on the east end of the side, lengthwise of the east side of the push-table A, represents a shaft, a two-inch shaft running the length of the table, to revolve the rollers. All these rollers, including the dog-roller, were connected with the same shaft. The power was applied to them at the south end of the table, that is, of the shaft down in there. [Pp. 95 to 101, Trans. of Record.]

“As near as I can estimate, the number of revolutions of that shaft is around the neighborhood of 100 revolutions a minute. I never gave any thought to the shaft itself, the shaft being rolled through gears. I don't know whether it is geared up or lower, but it runs, in order to run the rollers at about 100 revolutions a minute. If I remember rightly the shaft runs the same as the rollers, being they were connected up with cogs in such a way that it would have to turn at the same rate as the rollers, making it about 100 revolutions. The shaft was in operation during all the time that the work was going on, sawing and delivering of lumber. This gang of four employees had to keep everything clear, up to the trimming-table, to the time they got the lumber. They had to keep clear all along those skids, and on the push-tables, and on the trimming-table.

“Q. On the trimming-table, you mean? A. On the carrying-tables.

“Those four men were the only employees who were charged with the duty of having the lumber that came from the mill, loading them on trucks and keeping the skids and push-table and the carrying-table in operation and unclogged. The mill is not worked that way now. [Trans. of Record, p. 103.]

I had been working about two weeks, and the machine stood idle for about a week, and during that time this machinery was put in, this new machinery. I don't [103] know for what purpose the two joists or beams between the push-table and the carrying-table are there, but it was covered with boards, making a little platform in between there. There was a platform there. The height from the loading-table up to that little platform as shown on my plat was 2 feet 4 inches. This does not show the planks across, but there were boards. That was an actual platform, and the height was 2 feet 4 inches from the loading-table. From that little platform or step up to the carrying-table was one foot three inches. The top of the push-table above the carrier-table was two feet.” [Trans. of Record, p. 106.]

On cross-examination, with reference to the time he had worked, after the installation of the push and carrying-tables, defendant in error said:

“This machinery that was put in during the interval when my employment stopped and before Mr. Kelty re-employed me was the push-table and the carrying-table; they had not been there before; they were the new machinery. They had been there about two weeks before this accident occurred; I had worked during those two weeks, and it was during that two weeks that Mr. Kelty

You cannot necessarily step over it easily after you get used to it. I had to step from B. I did that several times every day, and sometimes a great many times a day. * * *

“I could see trucks of lumber standing all around. I thought the truck was too low, or too high, I don’t remember which, to go up on. I have gone up on trucks of lumber, but I generally went over the way I went that day. I was in the act of stepping over and the next thing I knew my foot was caught. There was a little board down by the side there, my foot was caught between the edge of the board and the roller. [110] I could not say what the board was there for. *I had seen it there very often. Of course, when I stepped over I knew the roller was there.* I do not know how it was that I happened to get my foot caught that time; it was done so quick—just like a flash. My intention was to get that board out because there was other lumber coming, and the next thing I knew my foot was caught, even before I had any pain at all. *I intended to make the step the same as I had usually made and clear it,* and suddenly I felt my foot was caught, and the next instant it was being crushed. * * *

“Mr. Keltie was our foreman. I never spoke to him or ask him if there was any way of getting up except over this dog-roller. I never made any complaint to anybody about it. I had no idea that I was going to get hurt the day of the accident when I considered going up over that dog-roller. I had done it probably a hundred times and had no idea that there was any danger to me of an accident, until my foot got caught.” [111] * * * [Trans. of Record, pp. 112-115.]

On cross-examination in the deposition, by his own counsel, he said:

“When a jam occurred there was an arrangement for stopping the mill in some parts of the inside, or from the engine direct, the engine that propelled all the machinery of the mill; in general, the power was all furnished from one engine in running all these different portions of the mill. [Trans. of Record, p. 117.]

“I was the most active of the gang in which I was working. I was then about seventeen years, three months and a half old. [115] I was very well grown and strong for my age. The other men went up there at times, but I did the most of it.” [Trans. of Record, p. 119.]

“Mr. Evenson saw us get up there many times. He was about the mill constantly. He never cautioned me about this dog-roller or explained to me anything about the danger of the work there. Mr. Kelty never gave me any such caution; he knew the men were doing this work in that way. At the time Mr. Kelty told me to get up and release the jam, sometime before this accident, I got up on the carrier-table—being at the first place, I cleared out what there was there, and I got up on the push-table, the same way I did when I got hurt. Mr. Kelty saw me go up there.

“Q. Did he tell you what the nature of this work was, as to keeping you on the jump? A. Well, we had to keep it cleared out as fast as the lumber came, else the mill would get ahead of us.

“It was constantly heavy work; had to keep on the move from morning till night unless the mill happened to stop, when they were changing the saws, or some-

thing like that, then we would get a little rest. [Trans. of Record, p. 122.]

“Q. Of course you knew it would be easy to get your foot hurt if you got your foot caught in the roller?

A. I never gave any thought to it.

“Q. You would have if you had stopped and looked at it? A. Not necessarily.

“Q. *You knew it was revolving?* A. *Yes, sir.*

“Q. You didn't mean to get your foot in? A. No, sir. But as to knowing it would be dangerous, I never gave any thought to that.

“I would not have experimented or stuck my foot in it if I could have helped it. I intended to step over it and by it. I would not have gone if I had known I would get my foot caught.” [Trans. of Record, pp. 126-127.]

His testimony at the trial, on cross-examination, was as follows:

*“Roughly, I knew the entire process then as well as now. I was practically as familiar with the machinery of the Benson Lumber Company Sawmill at that time, except I didn't know the measurements. I knew the general course as to how the lumber was handled, how it was carried up to the trimmer and carried down the skids to the table, and then lengthwise on to the receiving-table, and then loaded from there on the lumber trucks or lumber buggies, and disposed of. I had been through the mill. * * **

“I am interested in new things. Interested enough to become a student of mechanics, and take lessons in this kind of work. I suppose I could say I was in-

terested in mechanics. I believe those things interested me a little more than ordinary matters that mechanics have to deal with. When I went down there and saw this machinery, I don't believe I examined the spike-roller or dog-roller. *When the machinery started running, I found out the purpose.* * * *

"That is the board that I marked X on the model. That board is removed from the spike-roller about an inch and a half, to estimate the exact distance, or maybe two inches,—in that neighborhood. In regard to the distance from the cylinder or the spikes under the roller as they came around, it was left just clearance enough from the spikes for them to clear, maybe an inch and a quarter or inch and a half, maybe as close as an inch, it might have been." [Trans. of Record, pp. 135-138.]

"I can't say whether my foot caught in there as I went up or whether I stepped clear up and my foot slipped back in again. It was all done so quick I can't form any opinion. The whole transaction only occupied a very few seconds. * * * *When I started to get up, I think the carrying-table was absolutely free of lumber. There was no lumber coming down. I did not speak to anybody before I started up. I didn't tell anybody I was going to go up. I did not make any effort to stop the mill before I started up. I had been up there many, many times before. Practically always went up the same way. I believe I had mounted the push-table while this continuous process of moving the lumber was going on. There was danger of having your feet knocked from under you by the timber that*

was coming down, if you jumped up in that way. I don't think I appreciated that fact at that time. *I knew that roller was revolving.* As near as I can remember, the roller made about a hundred revolutions a minute. I never gave any thought to whether or not if I put my foot in there it would knock the teeth of the roller out.

“Q. You knew that, you didn't have to think of it.
A. I didn't try it.

“Q. There are some things you don't have to think about; didn't you know, without stopping to think, if you got your foot in there that it would not hurt the roller? A. I know it now. I didn't stop to think about it then. *I suppose I knew it. Most likely I knew if I got my foot in there it would be injured.* I don't see how you can expect me to state that I knew if I got my foot in there I would be badly injured, at least would be injured, *when I never gave it a thought at the time. I suppose I ought to know it if that is what you mean. I knew the board X in the model was there. I never attempted to put my foot on that board by stepping on the carrying-table on the board and then over.*

“When I have given the distance as two feet from the carrying-table to the push-table, I mean that portion of the push-table right to the edge of the roller. The diameter of the roller is six inches. The space between the board marked X and the extreme south end of the platform or push-table is about nine inches. In order to land safely upon the platform and not be in danger of getting my foot in the roller, I had to clear that roller entirely. And it extended out about an inch

above the surface of the platform. I had to step two feet up and two feet and at least nine inches, in order to clear it. [Trans. of Record, pp. 149-151.]

“When I saw the jam on the push-table on the 30th, the reason I did not stop the trimmer was because I knew it would cause an accumulation of lumber on the trimmer, and I thought about that and took the other means. I went ahead to clear it out. Generally we had time to clear it out before any jam comes from the trimmer.” [Trans of Record, p. 155.]

“Q. You appreciated if you put your hand in that revolving [151] dog-roller, it would get torn and get hurt, did you not? A. *I never gave any thought to that either. If I had thought, most likely I would have known it. I never had any occasion to think of it.*” [Trans. of Record, pp. 156-157.]

“I do not know what this board which was immediately in front of the spike-roller was for. I was informed afterwards that it was there for the purpose of avoiding getting your clothes in the teeth of that roller when you got up on the platform.” [Trans. of Record, p. 159.]

“I knew what the push-table was for, simply to carry the lumber back into position again. I knew what the carrier-table was for. I knew that the lumber came down with considerable force. *I knew it bumped up against this bumper out here, to keep it from falling off the push-table. I suppose I did know that if I got on there I would be likely to be hit by the large pieces, and knocked off my feet. I suppose I thought about it most likely.*” [Trans of Record, p. 165.]

We believe it is impossible to read the above statements of defendant in error without a firm conviction that he fully comprehended the dangers incident to his work. His study of the mill during his employment prior to his unfortunate accident was sufficient to enable him, years after, to draw a diagram of it and to give a detailed and accurate account of its entire operation, notwithstanding the fact that he had not been in the mill after his catastrophe. There was nothing concealed or latent about the dog-roller; it was in plain sight and its danger obvious to anyone. For two weeks prior to his injury the defendant in error had seen the dog-roller in daily operation; he knew that it was revolving at the rate of one hundred revolutions per minute; he knew there were iron spikes upon it; he knew that the dog-roller and other rollers in the push-table had force enough in their revolutions to push the lumber forward from the push-table to the carrying-table; surely he knew that if he allowed his foot or any part of his person to come into contact with an iron roller armed with long spikes, revolving with such force, that injury must result. Any child of six would know this. It is true that the defendant in error asserts he was not warned of the danger of stepping over the dog-roller. Although his testimony is in contradiction to that of two disinterested witnesses, we must assume that the jury accepted it as true. But what further warning could any person have given him than was afforded him by his senses? It was not necessary for his employer to tell him that fire would burn, or revolving iron crush and mangle. In the first of his testimony he said that he observed the saws of the

trimmer in rapid revolution. If he had attempted to pass over one of these saws instead of over the spiked roller, could he avoid the defenses of assumed risk or of contributory negligence by stating that he did not appreciate the danger of his acts because he did not stop to think the whirling saw would cut his flesh as readily as it would cut lumber? Yet, the danger of stepping over the roller was just as apparent as that of passing over the saw. He knew the roller was armed with sharp spikes and revolving at a tremendous speed. Every minute of the day he saw its teeth catch heavy lumber and move it swiftly forward. Surely he must have realized that if flesh and blood came in contact with these whirling iron spikes, injury would follow. Indeed, he said:

"If I had had occasion to stop and think I would have known and appreciated that there was danger."
[Trans. of Record, p. 166.]

One cannot thus close his eyes to obvious danger and recover for injuries he could easily have avoided. He cannot voluntarily blindfold himself and say he did not know he was in peril or that he should have been warned against the danger he could easily have seen.

But, if it be true, as contended by counsel for defendant in error, and as held by the learned District Court, that under the amendment of 1907 an employee did not assume the risks which he did not actually fully understand and appreciate, although his failure to so understand and appreciate them was due to a lack of ordinary care on his part, still there could be no re-

covery. Under such circumstances, although the defense of an assumed risk would be defeated, that of contributory negligence would be conclusively established. There would be no escape from the proposition that the employee had exposed himself to a danger he did not understand through a lack of ordinary care upon his part. Negligence simply consists of unnecessarily exposing one's self, or others, to danger through lack of ordinary care.

But, notwithstanding his many protestations that he did not stop to think of his danger, his own declarations contradict him. We quote again from his evidence:

"I intended to step over it and by it. I would not have gone if I had known I would get my foot caught."
[Trans. of Record, p. 127.]

Why would he have desisted from going over the roller if he had known he would get his foot caught, unless he realized that getting it caught would be injurious to him?

Again, it will be remembered that he testified that he had gone over the roller many times a day for a period of at least two weeks and had always stepped clear of the roller, thus showing that he realized that it would be dangerous to come in contact with it. Indeed, that a boy seventeen years old did not know that to get his foot caught between a board and a spiked roller making one hundred revolutions per minute would injure him, is so absurd that, as we have shown, on cross-examination, he was forced to admit:

"Most likely I knew if I got my foot in there it would be injured." [Trans. of Record, p. 150.]

As we have seen, he had in mind the fact that lumber was coming over the push-table, for he stated on his cross-examination that he had stopped the trimmer before, but he did not do it on that occasion because he did not think it was necessary; that when the trimmer was stopped there was no lumber coming over the skids or onto either table; that he thought about the advisability of stopping the trimmer and decided not to. [Trans. of Record, pp. 155-156.] Thus, it is clearly apparent that he not only knew the dog-roller was revolving rapidly, but that lumber was passing upon both tables, and as we have before seen, he repeatedly said that in going on either table he had to guard against being struck by lumber. Yet he deliberately decided not to stop the trimmer, but run the risk of being struck by lumber as he passed over the dog-roller.

A clearer case of the assumption of risk, under the most liberal interpretation of the amendment of 1907 (even assuming that it changed or modified the rule of common law), we are unable to understand.

In

Hall v. Clark, *supra*, 163 Cal. 392, 395,

the plaintiff was driving a dump wagon engaged in excavating a cellar. The defendant had a runway constructed into the cellar. After the plaintiff had dumped a load of earth which he had hauled out of the cellar and while driving toward the runway the defendant's foreman halted him and told him to drive into the excavation over a perpendicular bank three and a half to four feet high. Plaintiff answered, "Where—off there?" The foreman answered, "Yes." Plaintiff re-

plied, "I can't drive off there." The foreman asked "Why?" and plaintiff replied, "It will hurt the mules." The foreman answered, "Never mind that, that is where I want the wagon to go over there." And, the plaintiff relying on the directions of the foreman, and without stopping to think that he might be injured, drove off the bank. Of course he was hurt. Defendant's motion for a directed verdict was denied and a verdict returned by the jury in favor of the plaintiff and against the defendant, on which the trial court denied a new trial. In the Supreme Court it was contended, as here, that the second paragraph of the amendment of 1907 had worked an important change in the defense of assumed risk; that unless actual knowledge of the danger to be incurred be fastened upon the injured servant, he could not be held to have assumed the risk. The Supreme Court of the state of California expressly held that the amendment of 1907 made no change in reference to the rule of assumed risk, saying in part (the italics are ours):

"It is thoroughly settled that an employee is not warranted in following the direction of an employer, except where he acts under what under the law amounts to duress or coercion, where the danger to be encountered in doing so is at once so obvious and so serious that no ordinarily prudent person of similar age and experience, situated as was the employee, would have obeyed the order, and that where the rules as to contributory negligence and assumption of risk are such as they were

in this state at the time of this accident, the employee receiving personal injuries by reason of following such direction cannot recover damages therefor from his employer. It is not disputed by counsel for plaintiff that this was the law in this state prior to the amendment of section 1970 of the Civil Code, in 1907, (Stats. 1907, p. 119), by which the legislature added to that section, among other things, a provision that knowledge by an employee injured of the defective or unsafe character of any machinery, etc., shall not be a bar to recovery for any injury caused thereby, unless it shall also appear that such employee 'fully understood, comprehended and appreciated the dangers incident to the use of' the same. *This amendment did not change the rule we have stated.* If the danger is so obvious and serious that no ordinarily prudent person of similar age and experience, situated as was the employee, would have done the act, even though ordered by his employers to do it, it is manifest that the situation is such that the employee will not be heard to say that he did not fully understand, comprehend, and appreciate the danger incident to the doing of the act. As said by this court in *Limberg v. Glenwood Lumber Co.*, 127 Cal. 598, 600, (49 L. R. A. 33, 60 Pac. 176, 177): '*He cannot be allowed to close his eyes to the danger, and thereafter say, "I did not know it was dangerous."*' ' ' "

Bresette v. E. B. & A. L. Stone Co., 162 Cal.

74, 77,

is on all fours with the case at bar. There the appellant, plaintiff below, brought an action to recover for the loss of his arm. He alleged that he was employed by the defendant as an oiler; that he had been a barber before that and had no experience in the operation of machinery. As a part of his duty, in oiling some of the machinery he had to reach across moving and unguarded gears, and that, while doing so, the sleeve of his left arm was caught in the revolving gears and his arm injured to such an extent that it required amputation. He alleged negligence of the defendant in failing to have the gears properly guarded and in failing to appropriately instruct him as to the danger; and further, that, owing to his inexperience, he did not appreciate the danger of his work. The Supreme Court of this state held the last allegation unavailing, and that the complaint did not state a cause of action, saying (the italics are ours):

“The allegations of the amended complaint hereinbefore substantially set forth show that the sole reason for the unfortunate injury to plaintiff was that he allowed the sleeve of his coat to catch in certain exposed and uncovered gearing over which it was necessary for him to reach in the performance of his work as an oiler. The complaint in one count is substantially that the defendant was negligent in not warning him, he being a man inexperienced in the use of machinery, as to the danger and the necessity for care in the performance of

this duty, and in the second count that the defendant was negligent in setting him to work in a place dangerous by reason of the fact that the gearing about which he was compelled to perform his work was unprotected and unguarded. There is absolutely nothing in the complaint to intimate that the exposed condition of this gearing was not obvious. Fairly construed, the allegations of the amended complaint affirmatively show that the only condition of the machinery having to do with plaintiff's injury was patent to any casual observer, and that any one, no matter how inexperienced he was in the use or knowledge of machinery, would necessarily know of the risk entailed in working over the gearing, and that if he allowed his hands or arms to come in contact with the gearing, he would be severely injured. Whatever danger was attendant upon the performance of his duties by plaintiff in that place, was clearly apparent to any one. That danger was the possibility of allowing his hands or arms to come in contact with the uncovered and unguarded gearing. That one's hands or arms will be hurt if allowed to become involved in the cogs of moving machinery is so apparent a fact that certainly any adult must know it. In spite of such a general allegation of the absence of knowledge on the part of the employee as we have in this case, a complaint is demurrable if the specific allegations thereof show that he must have known of the defects and the danger therefrom.

(See 1 Labatt on Master & Servant, sec. 388; Cleveland etc. Co. v. Powers, 173 Ind. 105, 88 N. E. 1073, 89 N. E. 485.)

“Under these circumstances, even if we assume that there was any negligence on the part of defendant in respect to the matters alleged in either count, a complete answer to plaintiff’s action is to be found in the law relative to assumption of risk as it existed in this state at the time he received his injuries. With full knowledge of the alleged defect in the matter of the machinery, and with full understanding and appreciation of the dangers therefrom attendant upon the performance of his duties as oiler, he voluntarily entered upon the employment and continued therein to the time of his accident, a period of nearly two months, without making any complaint as to the conditions. As to such a situation, under the law as it was at the time of the accident, there is practically no disagreement among the authorities. The employee assumes the risk, and cannot recover for injuries resulting therefrom. This rule is recognized by section 1970 of the Civil Code, where it is provided that mere knowledge by an employee of the defective or unsafe character or condition of any machinery, etc., shall not be a bar to recovery, unless it shall also appear that the employee fully understood, comprehended, and appreciated the dangers incident to its use, and thereafter consented to use the same or continued in the use

thereof. *It was not until the act of April 8, 1911, (Stats. 1911, p. 796) was enacted that any attempt was made to abolish the defense of assumption of risk. The rule and its limitations have been fully discussed in various decisions of this court. (Citing numerous decisions rendered previous to 1907.)* 'The requirement that the place of employment shall be reasonably safe is itself always to be considered in connection with the rule of law as to the assumption by the employee of known and understood risks.' There is nothing in the facts of this case as disclosed by the complaint to take it out of the operation of the rule precluding recovery. The facts shown by a fair construction of the allegations of the complaint present a case where the only inference that can reasonably be drawn is that plaintiff knew that the gearing over which he was to reach in doing his work was uncovered and unguarded, and understood and appreciated the risk and danger attendant upon the performance of his work under such conditions, and that he nevertheless voluntarily assumed his employment without any complaint as to the conditions, and continued therein to the time of the injury, a period of nearly two months, without any complaint or criticism of such conditions.

"In view of what has been shown as to the obviousness of the danger, it is also clear that the defendant was not guilty of negligence productive of injury in failing to instruct plaintiff as to such

danger. There was nothing to tell him in this regard that he did not already know or must be presumed to have known. In this connection, the language of the Supreme Court of Massachusetts in *Wilson v. Mass. Cotton Mills*, 169 Mass. 67, (47 N. E. 506), is pertinent. The court said: 'The plaintiff's contention is that he was set to work on a dangerous machine without proper instructions. But it is difficult to see what the defendant's officers could have told him that he did not already know. *It was apparent that the wheels were uncovered. They were certainly not bound to tell him that if he got his hand in the cogs he would be hurt. This any child of ten would know.*' " (pp. 77-79.)

We are unable to distinguish the above case from the one at bar. To us they seem identical.

Mr. Coffin testified that he either saw or thought a piece of lumber struck McCann's foot. McCann, however, testified, as we have seen, that there was no lumber coming onto either table at the time he started for the push-table. But, whether his foot was caught by his making a misstep or by being struck by lumber, is immaterial, the danger of either was open and apparent. For two weeks he had seen and known that lumber traveled on both tables; he knew the trimmer was in operation; he said many times that he realized when he got upon either the push or carrying

tables he had to watch out to avoid being struck by lumber [Trans. of Record, p. 165]; that he could have stopped the trimmer and so have stopped the flow of lumber; that he thought of that before starting for the push-table, but decided not to stop the trimmer. [Trans. of Record, pp. 155-156.]

It doubtless will be urged here, as it was in the district court, that the defendant in error was a minor and therefore did not assume the risk of his injury. No proposition is better established than that a minor, as well as an adult, assumed all risks of which he knew or should have known by the exercise of ordinary care.

In

St. Louis Cordage Co. v. Miller, *supra*, 126 Fed.
495, 511, *et seq.*,

the plaintiff was a girl twenty years old. She attempted to stop a machine at which she was working. Her hand slipped from the lever which controlled the machine and her fingers were caught and crushed in the unguarded cog wheels which had been negligently left exposed. It was held that the trial court erred in not directing a verdict for the defendant for the reason that the plaintiff assumed the risk of her injury, the court saying in part (the italics are ours):

“It is suggested that the plaintiff was only 20 years of age, but she had been employed in factories for many months, and the danger from mashing cogs that had been visible to her for six weeks was as apparent and appreciable to a woman of her age and experience as to a person of greater

age or more extended experience. *She could not fail to know as well at 20 as at 40 years of age that fire would burn, or mashing cogs would crush her fingers.* A person 20 years of age assumes the risks and dangers that he actually knows and appreciates, and those that are so apparent that one of his age and capacity would in the exercise of ordinary care know and appreciate them to the same extent as one of more mature years. *Bohn Mfg. Co. v. Erickson*, 5 C. C. A. 341, 344, 55 Fed. 943, 946; *Engine Works v. Randall*, 100 Ind. 293, 298, 300, 50 Am. Rep. 798; *Berger v. Ry. Co.*, 39 Minn. 78, 38 N. W. 814; *Sullivan v. Mfg. Co.*, 113 Mass. 396; *Fones v. Phillips*, 39 Ark. 17, 38, 43 Am. Rep. 264.

“Now, while it is true, as the decisions to which we have adverted declare, that mere knowledge of a defect by a servant who continues in the employment does not necessarily establish the fact as a matter of law that he has assumed the risk it entails, and while it is also true that he does not assume such a risk unless an ordinarily prudent person of his capacity in his situation would have appreciated the danger from it, it is equally true that a servant who enters or continues in the employment of his master in the presence of visible or obvious defects and plain or apparent dangers from them, which he knows or appreciates, *or which an employe of his intelligence and capacity would by the exercise of ordinary care and prudence know and appreciate*, assumes the risk of

these dangers, and he cannot be heard to say that he did not appreciate them, and when the uncontradicted evidence establishes these facts no case arises in his favor, no question remains for the jury, and it is the duty of the court to peremptorily instruct them to return a verdict for the master. This is a familiar and well-established rule of law. It is sustained and illustrated by the following cases, in which courts have held that it was the duty of the trial court to direct a verdict for the employer: Higgins Carpet Co. v. O'Keefe, 51 U. S. App. 74, 80, 79 Fed. 900, 902, 25 C. C. A. 220, 222, in which a boy 15 years of age who had been at work in a room with a picking machine was assigned to feed it, and permitted his hand to slip into the exposed cogs, which the factory act of New York required the master to keep covered; Buckley v. Mfg. Co., 113 N. Y. 540, 21 N. E. 717, wherein a boy 12 years old slipped and threw his fingers into exposed cogs; Engine Works v. Randall, 100 Ind. 293, in which a boy 19 years of age permitted his hands to engage with revolving cogs; Berger v. Ry. Co., 39 Minn. 78, 38 N. W. 814, wherein a boy in feeding rollers in a boiler-making shop permitted his hand to slip between them; Kleinst v. Kunhardt, 160 Mass. 230, 35 N. E. 458, wherein the servant fell upon a slippery floor and threw his hand against a pulley, which injured it; Tuttle v. Detroit & Milwaukee Railway, 122 U. S. 189, 195, 7 Sup. Ct. 1166, 30 L. Ed. 1114, in which the Supreme Court held that a

brakeman could not be heard to say that he did not appreciate the dangers of a sharp curve in the railroad track, from which he suffered injury; *Kohn v. McNulta*, 147 U. S. 238, 241, 13 Sup. Ct. 298, 37 L. Ed. 150, in which the same court held that double deadwoods on cars were obvious defects and the danger from them was apparent; *Southern Pac. Co. v. Seley*, 152 U. S. 145, 154, 155, 14 Sup. Ct. 530, 38 L. Ed. 391, wherein that court made the same holding, and entered the same judgment, in an action for injuries caused by an unblocked frog; *King v. Morgan*, 48 C. C. A., 507, 509, 109 Fed. 446, 448, a case of an injury from the use of an iron tamping bar instead of a wooden one; *Cudahy Packing Co. v. Marcan*, 45 C. C. A., 515, 517, 106 Fed. 645, 647, where a block on which a boy 17 years of age was standing slipped upon the greasy floor and caused him to throw his hand into a hasher; *O'Maley v. South Boston Gas Light Co.*, 158 Mass. 135, 32 N. E. 1119, 47 L. R. A. 161, wherein a servant wheeling coal fell from an unprotected way which the factory act of Massachusetts required the master to keep guarded; *Glover v. Bolt Co.*, 153 Mo. 327, 55 S. W. 88, in which a boy engaged in pulling iron from a pile fell and placed his fingers between closing shears; *Mundle v. Mfg. Co.*, 86 Me. 400, 404, 30 Atl. 16, in which a servant received a sliver in her foot from the floor on which she was working; *American Dredging Co. v. Walls*, 84 Fed. 428, 429, 28

C. C. A. 441, 442, wherein the servant slipped, fell, and his hand was caught in the machinery because there were no cleats on a slippery inclined table upon which he was required to go to oil the machinery; *Hoard v. Mfg. Co.*, 177 Mass. 69, 71, 58 N. E. 180, and *Whalen v. Whitcomb*, 178 Mass. 33, 34, 59 N. E. 666, wherein servants were injured by depressions in the floors on which they were working; *Sullivan v. Simplex Electrical Co.*, 178 Mass. 35, 39, 59 N. E. 645, in which the hands of a boy 19 years of age who was feeding rubber between rollers were caught and injured by the rollers; *Ford v. Mount Tom Sulphide Pulp Co.*, 172 Mass. 544, 546, 52 N. E. 1065, 48 L. R. A. 96, wherein the servant was injured by a set screw in a revolving shaft which had been placed there during his service. * * *

“The record in the case at bar has been searched in vain for any fact or testimony adequate to withdraw it from the principles of law established by this strong current of decision, or to distinguish it from the cases which have been cited to illustrate the rule. This plaintiff was a young woman 20 years of age. The presumption is that she was possessed of ordinary intelligence and ability. She had been at work in factories for more than a year, and in the establishment of the defendant for more than six months. She knew that the gearing which injured her had been covered before Christmas, and that it was uncovered from that time until she was injured, on February 13, 1902. She had

worked at this machine by the side of the exposed mashing cogs from 10 to 15 minutes every day during the six weeks that they remained uncovered. She testified that she did not know that it was dangerous to run the gearing uncovered, but she knew the action of the lever, the greasy condition of its handle, its proximity to the mashing cogs, *and she could no more have failed to know and to appreciate that the revolving cogs would crush her hand if she permitted it to slip between them than she could have failed to appreciate that boiling water would scald or fire would burn. One cannot be heard to say that he does not know or appreciate a danger whose knowledge and appreciation are so unavoidable to a person of ordinary intelligence and prudence in a like situation.* King v. Morgan, 48 C. C. A. 507, 509, 109 Fed. 446, 448; Moon Anchor Consol. Gold Mines v. Hopkins, 49 C. C. A. 347, 353, 111 Fed. 298, 304; Sullivan v. Simplex Electrical Co., 178 Mass. 35, 39, 59 N. E. 645; Buckley v. Mfg. Co., 113 N. Y. 540, 21 N. E. 717. The machinery, the cogs, the slippery lever, and their relation to each other, were open, visible, known. There was nothing recondite, imperceptible, uncertain, in the danger impending from them. It was plain and certain that if the employe permitted her hand to slip between the revolving cogs, that hand would be injured. The defect of the unguarded gearing was obvious, the danger from it was apparent, and, without a disregard of the rules to which we have adverted and

the decisions of the Supreme Court and of the other courts of the country to which reference has been made, there is no escape from the conclusion that the evidence in this case established without contradiction or dispute the facts that the plaintiff, by continuing in her employment without complaint, in the presence of an obvious and known defect and of a plain and apparent danger, assumed the risk of the injury which she sustained, so that she never had any cause of action against the defendant; and the court below should have so instructed the jury. The judgment below is accordingly reversed, and the case is remanded to the Circuit Court for a new trial." (pp. 511, 512, 513, 514.)

In

Buckley v. Guttapercha & Rubber Mfg. Co.,
supra (N. Y.), 21 N. E. 717, 718,

the plaintiff, a boy twelve years of age, was required to work about exposed and unguarded gears. While doing his work he slipped and fell to the floor, and, throwing out his hands to save himself, was caught in the gears and was injured. It was held that he assumed the risk of his employment, the New York Court of Appeals saying in part:

"It was not needful to instruct him that the cogs were dangerous, because that was obvious. He could see as well as anybody that if his fingers got into the cogs they would be crushed to pieces. He was not injured because he did not know that the cogs were dangerous, but the injury happened because he slipped and fell, and instinctively threw out his hand to recover himself. His falling was

a mere accident, and no amount of instruction or caution from the agents of the defendant would have prevented the accident, and saved him from the injury. His injury did not come from any ignorance of the machines, or of the danger to which he was exposed, but it came solely from the accident.” (p. 718.)

The language is especially appropriate to the case at bar. It is evident that the unfortunate injury was not caused by any failure of the defendant in error to appreciate the danger of stepping over the roller, but from his accidentally getting his foot caught between the roller and the “X” board. We again call attention to his positive statement on page 127 of the record, that he intended to step clear of the roller, that if he had known that his foot would come in contact with it he would not have attempted to step over it. Had his employer warned him ten times a day that the roller would injure him if he touched it, the accident would not have been prevented, for it was not caused by his intentionally stepping upon the roller in a mistaken belief that it was harmless, but by the fact that his toe accidentally struck it, when he intended to step over it.

Again we quote his statement:

“Most likely I knew if I got my foot in there it would be injured.” [Trans. of Record, p. 150.]

See also:

Hackney v. Taaffe, 105 N. Y. 30, 37, 12 N. E.
286,

where a girl fourteen years old allowed her hand to

be drawn into the unguarded rolls of a laundry which were open and apparent.

In

Higgins Carpet Co. v. O'Keefe, 79 Fed. 900, the plaintiff, a boy twelve years of age, had been engaged for three days prior to the accident in feeding material into unguarded gears. On the second or third day of his employment he allowed his hand to be accidentally caught in the gears. The learned Circuit Court of Appeals for the Second Circuit, considering his case, said in part (the italics are ours):

“Error is assigned of the refusal of the trial judge to instruct the jury to find a verdict for the defendant. We are of the opinion that upon the facts the defendant was entitled to this instruction, and that there was no evidence to justify the leaving of the case to the jury.

“The plaintiff, although a minor, was of sufficient age and experience to be fully aware that his hand would probably be crushed if it were caught between the cog-wheels while the machine was in motion. He knew that the cog-wheels were not guarded in any way, and testified that when he was assigned to feed the machine he was told by the foreman that he must look out for himself, and be careful. He entered upon and continued in his employment with full knowledge of the risks incident to feeding or working about the machine consequent upon the location and condition of the cog-wheels and the absence of guards. If he had been an adult, it is plain that he would have had no

cause of action. *We think the circumstance that he was a minor is of no importance. The rules which govern actions for negligence in the case of children of tender years do not apply to minors who have attained years of discretion."*

See also to the same effect:

Federal Lead Co. v. Swyers, 161 Fed. 687, 693.

In

Glenmont Lumber Co. v. Roy, 126 Fed. 524, 528, the plaintiff, a boy twenty years of age, was employed in the defendant's sawmill. A part of his work was to lift lumber with a cant hook onto certain tables or platforms. He had been engaged in that kind of work six days prior to the accident. At the time of the injury his hook, which was loose, slipped as he tried to raise a log, and he fell to the floor, and as he did so his left arm was brought in contact with a revolving saw which was exposed and unguarded. He testified that he knew of the position of the saw; knew that it was in motion, and knew that his hook was loose and might slip with him, but that he did not appreciate the danger of doing the work in the way he was doing it, and that he had not been warned of the danger. It will thus be seen that the case and the one at bar are entirely similar. The learned Circuit Court of Appeals held that the plaintiff therein assumed the risk of his injuries and could not recover, the court saying in part (the italics are ours):

"An employee cannot be heard to say that he did not appreciate or realize the dangers where

*the defects were obvious, and the dangers would have been known and appreciated by an ordinarily prudent person of his intelligence and experience in his situation. * * **

“Where the uncontradicted evidence discloses the fact that the defects in the place or in the tools were obvious, and the dangers from them would have been apparent to an ordinarily prudent person of the intelligence and capacity of the servant, if placed in his situation, and the employee entered upon or continued in the service without complaint, the defense of assumption of risk is conclusively established, and the court should instruct the jury to return a verdict for the defendant.

“Every defect of which the plaintiff complains, the condition of the saw, the absence of the post at the lower end of the bumper, and the looseness of the cant hook in its socket, was obvious to a casual inspection, and was known to him within one hour after he entered upon the discharge of the duty of tending the chain. He was 20 years of age, and his testimony clearly discloses the fact that his ability, intelligence, and perception were not inferior to those of the ordinary young man of his age and experience. *A minor assumes the risks and dangers that he actually knows and appreciates, and those that are so apparent that one of his age, experience, and capacity would, in the exercise of ordinary care, know and appreciate them, to the same extent as does the adult.*”

Similar decisions could be quoted and cited indefinitely, but we believe the foregoing more than sufficient. We recognize, of course, the fact that numberless decisions can be obtained to the effect that mere knowledge by an employee of defects to ways or machinery will not bar a recovery unless the employee knows or should know of the dangers incident thereto.

Roth v. N. Pac. Lumber Co. (Ore.), 22 Pac.
842,

is a case of this character, and was greatly relied on by the defendant in error in the district court. In that case the plaintiff was required to receive sawed lumber from the defendant's mill and to load it. Jams occurred occasionally upon a table from which the plaintiff received lumber, and it was the plaintiff's duty at such times to go upon the table and clear away the jam. The only means of doing so was over a rapidly revolving shaft. In this shaft were several set screws, but the plaintiff did not know of them, and the facts were such as not to show that necessarily he should have known of their presence by the exercise of ordinary care. He had not been long engaged in that character of work and there was evidence that he had not seen the machinery except when in operation; at such times the shaft was revolving four or five hundred revolutions a minute and the set screws were invisible. In stepping over this shaft the plaintiff's clothes were caught by these set screws and he was severely injured. It was held by the Oregon Supreme Court that it could not be said as a matter of law that he had assumed the risk of his injury. That case is apparently very

similar to the one at bar, and yet it is entirely dissimilar. The occupation of the plaintiff and the defendant in error was almost identical. Each was required to go upon the same character of table, but there the similarity ends. The plaintiff in the Oregon case did not know and could not have known that the revolving roller over which he was stepping had a set screw, and it could not be held that in stepping over the shaft he assumed the risk of being caught or struck by a projection thereon of which he did not and could not have known.

In this case the plaintiff not only knew of the revolving dog-roller, but knew that it was armed with spikes projecting to within an inch of the "X board."

Sanborn v. Madera Flume etc. Co., 70 Cal. 261,
267,

although not cited by defendant in error in the district court, is a typical case of where a servant may know of a defect and not the danger. There the plaintiff was injured in defendant's sawmill. Part of its machinery for cutting lumber was a sword, whose province was to enter the cut made in a log by a saw. A proper sword, if it failed to enter the cut, would stop the machinery. The original sword having been broken, a piece of iron was inserted in its place. The plaintiff, who had worked in the lumber yard, and was unfamiliar with machinery, knew that the sword had been broken and a piece of iron substituted in its place, but he did not know of the manner in which such sword would work. At the time of the accident the defective sword failed to enter a cut, and, instead of stopping the

machinery, hurled the log backwards onto the plaintiff. The Supreme Court of California held that the plaintiff did not assume the risk of his injury for the reason that although he knew of the character of the sword he did not know that failing to enter a cut it would not stop the machinery, saying in part:

“We simply say that it is not enough that the servant knew or ought to have known the actual character and condition of the defective instrumentalities furnished for his use. He must also have understood, *or by the exercise of ordinary observation ought to have understood, the risks to which he is exposed by their use.* * * * The mere fact that the servant knows the defects may not charge him with contributory negligence or the assumption of the risks growing out of them. The question is, Did he know, *or ought he to have known, in the exercise of ordinary common sense and prudence, that the risks, and not merely the defects, existed?*” (Italics ours.)

The above decision was written many years prior to 1907, but it will be noted that it construed the law of assumed risk exactly as section 1970 of the Civil Code as enacted in 1907 declared it to be.

In the case at bar there is no allegation that the plaintiff was not possessed of the usual mentality of a boy of his age, and in the absence of such allegation it must be presumed that he was a boy of ordinary intelligence.

See

Limberg v. Glenwood Lumber Co., 127 Cal.
598-600;

- Dougherty v. West Superior Iron & Steel Co.
(Wis.), 60 N. W. 274-276;
Motey v. Pickle Marble & Granite Co., 74 Fed.
155-158;
Reiter v. Winona & St. P. R. Co. (Minn.), 75
N. W. 219;
Cripple Creek Sampling & Ore Co. v. Souza
(Colo.), 86 Pac. 1005-1006;
Burnell v. West Side R. Co. (Wis.), 58 N. W.
772.

This presumption of law, however, is not necessary, for the evidence given by the defendant in error showed that he was of more than ordinary intelligence. Though only seventeen years of age, he was doing a man's work. When he entered the employ of the company he undertook the study of the machinery, and his testimony shows that he understood the operation of the entire mill from the time the log was first taken from the water until the sawed lumber was delivered to him on the carrying-table. He knew that until the trimmer was stopped that lumber was delivered in continuous streams upon both the carrying and push tables; he knew when he got upon the table he had to guard against being struck by this moving lumber; he knew the position of the dog-roller and that it had teeth which projected within an inch of the "X board," and he knew that this spiked roller was revolving at least at the rate of one hundred revolutions per minute. Surely he knew and comprehended as much as any adult that if he allowed his foot to come between the revolving

roller and the board it must be seriously injured. In substance he says: "I knew this, and probably I realized that if my foot got caught between the 'X board' and the roller that it would be hurt, but I did not stop to think about it, therefore I did not comprehend the risk of stepping over the roller."

"He cannot be allowed to close his eyes to the danger, and thereafter say, 'I did not know it was dangerous.' "

Limberg v. Glenwood Lumber Co., *supra*, 127 Cal. 598-600.

"It is a rule of universal acceptance by the courts of this country that an employee assumes all the ordinary dangers of his employment which are known to him, or which by the exercise of ordinary diligence would have been known to him. It is alike the duty of the employer and employee to be diligent in the discharge of their reciprocal duties, for the avoidance of personal injury to the latter; and both are alike bound to know, and will be chargeable as knowing, all facts and conditions that a person of ordinary caution and prudence, in a like situation, would have discovered. *Neither may close his eyes nor carelessly neglect observation and inquiry for the safety of the employee, and find immunity on the ground that he did not have actual knowledge of the danger. In such cases constructive knowledge has the same force and effect as actual knowledge.*" (The italics are ours.)

Pennsylvania Co. v. Ebaugh (Ind.), 53 N. E. 763-764.

“If an employee in the exercise of reasonable care ought to have known of the dangers of the service, he will be held to the consequences of actual knowledge.”

Kansas City, M. & O. Ry. Co. v. Loosley (Kan.),
90 Pac. 990-993.

“It is the rule that obvious defects or perils, such as are open to ordinary, careful observation, are regarded by the law as perils incident to the service, and the dangers incident thereto are assumed by the servant.”

Jennings v. Ingle (Ind.), 73 N. E. 945-947.

See also

Chicago, I. & L. Ry. Co. v. Glover (Ind.), 57
N. E. 244-245;

Faber v. C. Reiss Coal Co. (Wis.), 102 N. W.
1049, 1050-1051;

Nelson v. Boston etc. Co., *supra* (Mont.), 88
Pac. 785, 786.

“It will not avail the plaintiff that he was not fully aware of his danger, for a plaintiff is bound to know the extent of the danger in cases like this, where the circumstances are known to him, or the hazard is apparent to a reasonably prudent man.”

L. S. & M. S. Ry. Co. v. Pinchin, *supra* (Ind.),
13 N. E. 677-678.

See also

Jones & Adams Co. v. George, *supra* (Ill.), 81 N. E. 4-5;

Dougherty v. West Superior Iron & Steel Co., *supra* (Wis.), 60 N. W. 274-277;

Denver & R. G. R. R. Co. v. Sporleder, *supra* (Colo.), 89 Pac. 55-57;

Central of Georgia Ry. Co. v. Price, *supra* (Ga.), 49 S. E. 683-685;

Cripple Creek Sampling & Ore. Co. v. Souza, *supra* (Colo.), 86 Pac. 1005;

Missouri Pac. Ry. Co. v. Click, *supra* (Kan.), 96 Pac. 796.

“If an appliance be introduced after the commencement of the employment, from the use of which follows a risk which the employee knows or ought to know—that is, if the risk or danger be known to him *or be patent and obvious*—he assumes the risk by continuing in the employment.” (Italics are ours.)

Sowden v. Idaho Quartz M. Co., 55 Cal. 443-452.

We respectfully submit that both in reason and from the foregoing authorities and many more which might be cited, it must be held that as the law existed at the time of this unfortunate accident the defendant in error assumed the risk of his injury and he therefore could not recover. There was nothing to submit to the jury, and the learned district court erred in denying the motion of the plaintiff in error to direct a verdict in its favor.

B.

THE EVIDENCE MOST FAVORABLE TO THE DEFENDANT
IN ERROR, AS A MATTER OF LAW, CONVICTED HIM
OF CONTRIBUTORY NEGLIGENCE.

As we have shown, defendant in error time and again testified that he failed to appreciate the danger because he did not stop to think of it. If he did not fully understand it and appreciate it, it was because he did not pay proper attention to his surroundings or exercise ordinary care to guard himself from known and obvious dangers. At the time of the happening of this accident it was the settled law in California that it was negligence *per se* for an employee to fail, through forgetfulness or inattention, to guard himself from known dangers.

See

Brett v. Frank & Co., 153 Cal. 267;

Ergo v. Merced Falls Gas & El. Co., *supra*, 161
Cal. 334, 339;

Davis v. Cal. St. Cable R. R. Co., 105 Cal. 131.

One of two propositions must be correct, viz.: Defendant in error either fully understood and knew the dangers incident to stepping over the dog-roller, in which case he assumed the risk of his injury, or else he failed to appreciate the danger of his act through an absolute lack of care upon his part to observe the dangers which were patent. In the latter event he exposed himself to an injury without appreciating the danger thereof through a want of ordinary care upon his part, and must be held to have been guilty of contributory negligence, as a matter of law.

II.

**The Court Erred in Giving to the Jury on its Own
Motion Instruction No. V.**

The fifth instruction given by the court as set out in the transcript of the record on pages 233 and 234, constitutes the second specification of error herein (see pages 19-20, *ante*), and the third assigned error in the assignments of error [Trans. of Record, p. 267]. By that instruction the court, after informing the jury that it was the duty of an employer to exercise ordinary care to furnish his employee a safe place in which, and safe appliances with which, to work, further charged:

“The servant does not undertake to incur the risk arising from negligence in providing or maintaining a safe place in which he is to work, or suitable and safe appliances, or other means with which his service is to be performed. His contract implies that, in regard to these matters, his employer will exercise reasonable care in making adequate provision that no danger shall ensue to him, and he has a right to assume and rely and act upon the assumption that such care has been exercised.” [Trans. of Record, pp. 233-234.]

The portion of the instruction above quoted clearly was not the law. While it was the master's duty to furnish a safe place to his employees, and in the absence of something to warn them to the contrary, an employee might assume that he had been furnished a safe place, still it was not the law that the servant did not assume a risk arising from the failure of the master to furnish a safe place in which to work or suitable appliances with

which to work, where such failure and the dangers incident thereto were known to the servant, or, by the exercise of ordinary care, should have been known to him. Otherwise, the defense of assumed risk would have been valueless. If the master was not negligent the servant could not recover, regardless of whether he assumed the risk or did not. Section 1970 of the Civil Code, by express wording, provided for the assumption of the risk by the servant of the danger arising from unsafe appliances or places of work being furnished the servant, providing he fully knew and comprehended the same.

We requote the words of the Supreme Court of California:

“Under these circumstances, even if we assume that there was any negligence on the part of defendant in respect to the matters alleged in either count, a complete answer to plaintiff’s action is to be found in the law relative to assumption of risk as it existed in this state at the time he received his injuries.”

Bresette v. E. B. & A. L. Stone Co., *supra*, 162 Cal. 74, 78.

“It is well-settled law that when a servant has knowledge of obvious dangers and perils incident to his employment, or if he, as an intelligent and reasonably prudent man, ought to have observed and to have known them under the circumstances of his service, then he assumes the hazards incident to the business as it is being conducted. *The fact that defendant may have conducted its busi-*

ness negligently in the respects mentioned in no way renders this rule inapplicable to the case, for it had the legal right to conduct its business in its own way, though a different and more prudent method might have prevented the dangers complained of. This is for the reason that if a servant agrees to undertake employment in a business being conducted in a certain way, he thereby assumes all the obvious dangers and hazards.” (The italics are ours.)

Faber v. C. Reiss Coal Co., 102 N. W. 1049, 1050.

“Although conditions have become dangerous through the negligence of the master, from failure to put up guards, and from allowing the floor to get into a state of disrepair, the servant will be understood to have assumed the risk of the employment, if he knew and appreciated, *or ought to have known and appreciated*, the danger resulting from the condition of matters in and about that alleyway.”

Brown v. Hitritz, *supra*, 192 Fed. 528, 530.

See also

Higgins Carpet Co. v. O’Keefe, *supra*, 79 Fed. 900.

The instruction, therefore, that the defendant in error did not assume the risk arising from the employer’s failure to furnish him a safe place in which to work or safe appliances to work with, was contrary both to the statutory declaration and the judicial inter-

pretation of the law. That it was most prejudicial to the plaintiff in error is apparent. The instruction absolutely eliminated the defense of assumed risk and very nearly the defense of contributory negligence. There was no question of assuming any risk other than that of stepping onto the push-table over the dog-roller. If then the jury should determine that such was the only means furnished by which the defendant in error could go upon the push-table, and that his employer was negligent in that respect, then, under the instruction the jury were told that he did not assume that risk.

It is true that the court, in instruction No. VI [Trans. of Record, pp. 236-237], told the jury that if the plaintiff, defendant in error here, fully knew and appreciated the danger of working on or about the machinery, he assumed the risk and could not recover. It is firmly established, however, that an erroneous instruction is not cured by a conflicting correcting instruction, for it is impossible to say which the jury followed.

See

Rathbun v. White, 157 Cal. 248, 253;

Ryan v. Oakland etc., 10 Cal. App. 484, 492-493;

People v. Westlake, 124 Cal. 452, 457;

Quint v. Dimond, 147 Cal. 707, 711-712.

Instructions V and VI, however, were not conflicting. If the machinery were defective and the defendant in error knew that he could not recover, provided the jury should believe that the defective machinery

or appliances were not due to negligence on the part of the plaintiff in error, but if they should believe that the defects in the machinery or appliances were the result of negligence upon the part of McCann's employer in failing to furnish him a safe place in which to work or safe appliances with which to work, then he did not assume the risks incident thereto or arising therefrom. We believe that this was not the law, and that the giving of Instruction No. V was prejudicial to the plaintiff in error and necessitates the reversal of the judgment.

III.

The Court Erred in Giving to the Jury on its Own Motion Instructions Numbered VI and VII.

The sixth and seventh instructions, as set forth in Transcript of Record, pages 236 and 238, constitute, respectively, the third and fourth specifications of error herein (pp. 20-21, *ante*), and the fourth and fifth assigned errors in the assignment of errors. [Trans. of Record, pp. 268-270.] The two instructions were to the effect that the defendant in error assumed the risk of his employment providing he fully knew, understood, comprehended and appreciated the dangers incident to his work. These instructions were not entirely correct. The defendant in error assumed the risk not only of such dangers of which he actually knew, but also all of the dangers of defects of which he should have fully known and comprehended had he been exercising ordinary care and observation. This defect in the instructions was pointed out by specific exceptions thereto and the court nowhere attempted to cure or modify their defects, but gave the jury plainly to understand that before the employee assumed any risk he must have actual knowledge thereof, thus eliminating from the case the question of whether he had full constructive knowledge of the dangers and risk incident to his employment.

The seventh instruction quoted the second paragraph of the amendment of 1907 and told the jury that it applied not only to the issues of assumed risk and contributory negligence, but that it also applied and should be considered by them in determining the issue of the

negligence of the plaintiff in error. We believe in this the learned district court inadvertently fell into a grievous error. The second paragraph of the amendment of 1907 did not deal with the negligence of an employer at all, but dealt solely with the question of assumption of risk and contributory negligence, being, as we have shown, but a statutory declaration of the rules of the common law as announced by both the Federal and state courts.

An employer was not liable merely because machinery or ways or appliances were dangerous. The duty which the law imposed upon him was to exercise ordinary care to keep them safe. This principle was recognized in the fifth instruction given by the district court. Now, it might often happen that a sawmill would be as safely constructed as it was possible, and still be dangerous. Machinery which will saw lumber must necessarily be inherently dangerous and cannot be made absolutely safe. Yet, if the employer had done everything possible to make it as safe as reasonably possible, he would not be negligent merely because some employee, through sheer thoughtlessness, might not appreciate the risk incident to an open, obvious and apparent danger.

Under the instruction as given, the liability of the plaintiff in error was not made to depend upon whether it had exercised due care for the protection of its employees. The question turned wholly upon whether the employees, or any of them, understood the perils to which they were exposed, regardless of whether those perils were open or obvious, and regardless of the amount of care exercised by the plaintiff in error to guard its employees, as far as possible, from those perils.

IV.

The Court Erred in Giving, on its Own Motion, Instruction No. VIII, and in Refusing to Give Instruction No. VI Requested by the Plaintiff in Error.

The giving of instruction No. VIII and the refusal to give No. VI requested by the plaintiff in error, constitute, respectively, the fifth and sixth specifications of errors herein (see pp. 21-23, *ante*), and the sixth and twentieth assigned errors in the assignment of errors. [Trans. of Record, pp. 270-271, 278-279.]

The court, on its own motion, in the eighth instruction told the jury that in determining the question of whether the plaintiff below, defendant in error here, fully comprehended and appreciated the dangers of his surroundings, it was proper for them to consider his youth and experience, and that where a servant was employed of such tender age and limited experience that he did not fully appreciate the danger or the risks incident to his employment, it was negligence to so employ him, even with his own consent, unless he was fully warned and instructed of the danger. [See Bill of Exceptions, Trans of Record, pp. 238-239.]

This instruction stated a correct rule of law in the abstract, but we think it inapplicable to the case at bar for the reasons heretofore given that there was no evidence showing that the defendant in error was of limited knowledge or experience or that he did not fully understand or appreciate the danger incident to his employment. If, however, we are incorrect, it must be conceded that it was, at least, a question of fact for the jury to say whether the dangers

of going up on the push-table over the dog-roller was so open and obvious that any intelligent person of the age and experience of defendant in error must have known and appreciated the same. With this in view, the plaintiff in error, after its motion for a directed verdict had been denied, by its sixth instruction requested the court to charge the jury as follows:

VI.

"You are further instructed that if there were any latent or obscure dangers or defects connected with the machinery in and about which plaintiff worked, that it was then the duty of the defendant to explain such latent defects or obscure dangers to the plaintiff and warn him of the dangers connected therewith. But if you shall find from the evidence [245] that the only dangers connected with the machinery around which plaintiff was employed were in plain view, and were not in any respect hidden, and were such dangers that the plaintiff had full knowledge of and fully comprehended and appreciated, then and in such event no obligation existed on the part of the defendant to warn plaintiff of the danger of his employment, and if injured under such circumstances, then plaintiff cannot recover." [Trans. of Record, pp. 254-255.]

As we have seen, the above instruction correctly stated the law.

"Appellant contends that respondent was guilty of negligence in not warning and instructing him of the dangers incident to his employment as loftsmen. Under the well-settled law in this state and

elsewhere it is the duty of an employer to instruct his employees only when the dangers of their employment are concealed. *No such duty is imposed on him where the dangers are obvious and apparent.* 20 Am. & Eng. Ency. of Law, 94, and cases cited; 1 Labatt on Master and Servant, p. 522, and cases cited. The rule is stated by Labatt in the following words: 'The failure to give instructions, therefore, is not culpable, *when the servant might, by the exercise of ordinary care and attention, have known of the danger*; or, as the rule is also expressed, where he had all the means necessary for ascertaining the actual conditions, and there was no concealed danger which could not be discovered.' " (The italics are ours.)

Mugford v. Atlantic, G. & P. Co., 7 Cal. App. 672, 676, 95 Pac. 674, 676.

See also, to the same effect:

Bresette v. E. B. & A. L. Stone Co., *supra*, 162 Cal. 74, 79;

Berger v. St. Paul M. R. Co. (Minn.), 38 N. W. 814, 815.

"The judge further charged: 'Now, was there anything that this boy needed instruction about in connection with that machine? If you shall say, considering his age, capacity, and experience, that it was necessary for his employer to warn him not to put his fingers in between the cogs, and that if he did so he would be injured, and if the employer failed to do that, that would be a specific act of

negligence for which he would be liable.' We think it is preposterous to say that it was the duty of the employer to warn him not to put his fingers in between the cogs. It might as well be required to warn a boy 12 years old, who was working about boiling water or a hot fire, not to put his hand into the water or the fire."

Buckley v. Guttapercha & Rubber Mfg. Co.,
supra (N. Y.), 21 N. E. 717, 718.

It is manifest that the plaintiff in error was entitled to have the jury instructed that if the dangers were so open and obvious that the defendant in error must have had full knowledge and appreciation of them, then there was no duty to warn him thereof.

V.

The Court Erred in Refusing to Give Instruction Number VIII Requested by the Plaintiff in Error.

The refusal of the court to give instruction No. VIII requested by the plaintiff in error constitutes the seventh specification of error herein (see p. 23, *ante*), and is the twenty-second assigned error in the assignment of errors. [Trans. of Record, p. 279.]

The instruction requested reads as follows:

VIII.

“The proximate cause of an injury in a damage case is that cause which naturally led to and which by a prudent person might reasonably have been expected to be instrumental in producing the injury complained of. In determining whether a certain act is the proximate cause of any injury, the proper test is: ‘Was the injury complained of, of such a character as might reasonably have been foreseen or reasonably have been expected to follow as the result of such an act?’ The rule of proximate cause has the same application in a damage suit in which a minor is plaintiff, as in the case of an adult.”

[See Trans. of Record, pp. 256-257.]

The instruction certainly presented a correct statement of the law and one which it was very material, from the standpoint of the plaintiff in error, to have given to the jury.

“But even where the highest degree of care is demanded, still the one from whom it is due is bound to guard only against those occurrences which can reasonably be anticipated by the utmost

foresight. It has been well said that, 'If men went about to guard themselves against every risk to themselves or others which might, by ingenious conjecture, be conceived as possible, human affairs could not be carried on at all. The reasonable man, then, to whose ideal behaviour we are to look as the standard of duty, will neither neglect what he can forecast as probable, nor waste his anxiety on events that are barely possible. He will order his precaution by the measure of what appears likely in the known course of things.'

Atchison, 'Topeka & S. F. R. Co. v. Calhoun etc.,
213 U. S. 1, 9.

"The injury must be the natural and probable consequence of a negligent act, and such as ought to have been foreseen in the light of attending circumstances. Railway Co. v. Kellogg, 94 U. S. 469."

Goodlander Mill Co. v. Standard Oil Co. (C. C. A.), 63 Fed. 400-405, *et seq.*

"But unless it could reasonably have been anticipated that the accident which was the immediate cause of the injury would occur, and he was compelled by the act or omission complained of to occupy that place, the injury would, in no legal sense, be the consequence of the act or omission. And it seems to us that there was no evidence of the existence of either of these facts."

Handelun v. Burlington C. R. & N. R. Co. (Ia.),
32 N. W. 4, 6.

“The proximate cause of an injury cannot be referred to negligence unless it appears that such injury was the natural and probable consequence of such negligence, and that it ought to have been foreseen in the light of attending circumstances.

* * *

“The elements of natural and probable result, and that the result ought to have been foreseen by a person of ordinary intelligence and prudence, in the light of attending circumstances, are distinguishing characteristics between mere accident, or negligence, from which no legal responsibility follows, and actionable negligence. If one be injured by the act of another, and such elements are not present, it is referred to natural imperfections to which the mass of mankind are customarily subject, and the risks incident to the human existence and human activity, which, in the associations of life, all members of society are supposed to assume.”

Deisentieter v. Kraus-Merkel Maltin Co. (Wis.),
72 N. W. 735, 737-738.

“The question is not whether it was a *possible consequence*, but *whether it was probable, that is, likely to occur, according to the usual experience of mankind*. That this is the true test of responsibility applicable to a case like this has been held in very many cases, according to which a wrongdoer is not responsible for a consequence which is merely possible, according to occasional experience, but only for a consequence which is probable, according to ordinary and usual experience.”

Stone v. Boston & Albany R. Co., 171 Mass. 636,
638, 51 N. E. 1, 3.

Had the instruction requested been given the jury doubtless would have concluded that the plaintiff in error was not negligent. In the first instance, as we have seen, it was not intended that any employee should go upon the push-table. Secondly, the defendant in error had gone there over the dog-roller without injury a number of times, and if he did not anticipate injury, why should his employer? As we have seen, it was admitted by the defendant in error that there were lumber buggies which usually stood along the push-table, on which an employee might mount. There was also evidence that the men on the loading-table, by signal, could and sometimes did stop the operation of the mill, and the jury might very easily have assumed that an ordinarily prudent man, in the situation of the plaintiff in error, might reasonably have assumed that his employees would not attempt to go onto the push-table over the dog-roller; that when it became necessary for any of them to go upon the push-table they would either climb upon it by way of the lumber trucks, or, if they could not use the trucks, that they would stop the mill before attempting to cross the dog-roller.

No similar instruction to that requested and refused was given. It stated a correct rule of law and one that was very essential to plaintiff in error to have given to the jury. The refusal of the learned District Court to give the instruction prevented the plaintiff in error from having its side of the case considered by the jury, and we believe that a reversal is the only remedy.

VI.

The Court Erred in Declining to Give Instruction Number XI, Requested by the Plaintiff in Error.

The refusal of the court to give instruction No. XI requested by the plaintiff in error constitutes the eighth specification of error herein (see pp. 23-24, *ante*), and the twenty-fifth assigned error in the assignment of errors. [Trans. of Record, pp. 281-282.]

Two acts of negligence were charged by the defendant in error: one, that his employer furnished him an unsafe place in which to work; two, that it was negligence in failing to warn him thereof. It is, of course, impossible to tell which theory, if either, was adopted by the jury as a foundation for their verdict. As a basis for the averment of negligence in failing to furnish him a safe place in which to work, the defendant in error, in the fourth paragraph of his second amended complaint, charged that when a jam of lumber occurred, it was necessary for him to go upon the push-table, and that the only means provided for him going there was over the dog-roller. [Trans. of Record, 46-47.] All of the allegations of negligence were denied by the answer of the plaintiff in error [Trans. of Record, pp. 68-80], and by an amendment to the answer, plaintiff in error specially alleged that there were other and safe means for the defendant in error to mount to the push-table.

Thus, the question as to whether the defendant in error was furnished no other means than mounting over the dog-roller was placed in issue by the pleadings and also by the evidence. Plaintiff in error, at the trial, contended and still believes that the evidence con-

clusively demonstrated, first, that no employe was expected to go upon the push-table without stopping the machinery; second, that there were two ways of going upon the push-table other than over the dog-roller, both of them perfectly safe. If such were the case, of course, the charge of negligence in failing to furnish a safe place for defendant in error to work was destroyed.

The eleventh instruction requested by the plaintiff in error and refused is as follows:

XI.

“The jury are hereby instructed that if they shall find from the evidence that plaintiff had knowledge of the fact that there were two ways by means of which he could have climbed upon the push-table—the one way being to step over the spiked roller and the other way being to climb over the side of the push-table, by means of the lumber buggies; the first way being extremely dangerous and so known to him to be, and the other way safe and known by him to be so. And if you shall believe from the evidence that he voluntarily chose the dangerous way of going upon said push-table, when there was no occasion or necessity for so doing, and in so doing received the injury of which he complains, that he cannot hold the defendant responsible for an injury which directly resulted from his voluntary and unnecessary choice of the more dangerous of the two ways of doing the work he attempted to do.”
[Trans. of Record, p. 259.]

At the time of the happening of this accident, it was the universally established law that where there were two ways for a servant to perform a task, one safe and

the other dangerous, and the servant voluntarily chose the dangerous method, he could not recover. Such necessarily must have been the law. Where an employer furnished a safe way in which to work, he should not be liable merely because, from the necessary construction of the machine there was another way by which the servant could do his work which was extremely hazardous.

Argument, however, is not necessary, for the rule announced in the instruction requested was the settled law of the state of California.

“The evidence shows beyond any question that the defendant had provided a safe and secure way to a closet for the employees of the car machine shop from the stairway on those premises up and along the upper story of the building. Having done so, it had done all that the law cast upon it, and it was the duty of the deceased when occasion required to take that safe way. When a safe way is provided by an employer and a dangerous way exists, if an employee chooses to take the dangerous way and is injured, he is guilty of contributory negligence as a matter of law. This is the rule universally recognized. As said: ‘Where a person having a choice of two ways, one of which is perfectly safe and the other of which is subject to risks and dangers, voluntarily chooses the latter and is injured, he is guilty of contributory negligence and cannot recover. An employee must take care of himself as well as the master must take care of his duties and his employees. These obligations are mutual, and it is the law that if a man

voluntarily puts himself in a dangerous position, does so unnecessarily when there are positions in connection with the discharge of his duties which are safe which he can be placed in, he cannot recover damages for the injury to which he has contributed by his own negligence.' (Bailey on Personal Injuries, secs. 1123, 1124.) In *Hoofman v. American Foundry Co.*, 18 Wash. 287 (51 Pac. 385), the rule is expressed: 'Where there are two methods by which a service may be performed, one perilous and the other safe, an employee who voluntarily chooses the perilous rather than the safe one cannot recover for an injury thereby sustained.' And in *Dandie v. Southern Pacific Co.*, 42 La. Ann. 686 (7 South. 792): 'The servant cannot recover where his own want of care has contributed to the injury. If among the different modes of performing a duty he selects the most dangerous, which unnecessarily exposes him to danger, he is responsible for the selection.' "

Douglas v. Southern Pac. Co., 151 Cal. 242, 250-251.

See also the great number of authorities cited in support of the decision, also:

Leard v. International Paper Co., 60 Atl. 700;
Covington v. Smith Furn. Co., 50 S. E. 761.

"When an employee has his choice of two ways in which to perform a duty, the one safe, though inconvenient, and the other dangerous, he is bound to select the safe method; and if, instead of so doing, he elects to pursue the dangerous way, and

is in consequence injured, he is guilty of such negligence as will bar an action for damages against the master.”

Atchison, T. & S. F. Ry. Co. v. Rudolph (Kan.),
99 Pac. 224, 228.

The same rule has been repeatedly recognized by the federal courts.

“Where there is a comparatively safe and a more dangerous way known to a servant by means of which he may discharge his duty, it is a want of ordinary care for him to select and use the more dangerous method.”

Gilbert v. Burlington, C. R. & N. Ry. Co., 128
Fed. 529, 534.

See to same effect and announcing the same rule:

Erdman v. Deer River Lumber Co., 182 Fed.
42, 45;

Morris v. Duluth etc. Co., 108 Fed. 747, 749;

Gowen v. Harley, 56 Fed. 973, 983.

There was more than sufficient evidence to justify the court in giving the instruction requested. In the first instance, as we have seen from the testimony already quoted, the defendant in error could have stopped the machinery before attempting to go upon the table. Indeed, Coffin, a fellow employee, testified that he was signaling the trimmer to stop at the time McCann attempted to go upon the table [Trans. of Record, pp. 212-213]. In addition to this the evidence clearly indicated that there were stationed at each side of the loading-table trucks which were kept loaded with lumber and upon which any employee could mount with safety to the push-table without going over the dog-roller.

The defendant in error himself said:

“At times I mounted this push-table from those cars or trucks. I don’t know exactly why I did not mount from one of those trucks on the day I received the injury unless, if I remember rightly, there was a truck there, a load so high if I once got upon it I would either tip down one end and dump off all the load, or pull half the load off on me if I jumped to get up on top. That is a kind of a recollection or impression, I suppose.” [Trans. of Record, pp. 145-146.]

“There was a truck alongside the push-table at the time this accident occurred; it was standing alongside the push-table; I was standing alongside the carrying-table.” * * * [Trans. of Record, p. 123.]

“I did not state positive that it was so piled with lumber that I was afraid the lumber might fall off. I said, ‘If I remember rightly it was that high.’” [Trans. of Record, p. 156.]

“The most convenient way was to get up on table B.” [Trans. of Record, p. 124.]

Mr. Kilty, foreman for the plaintiff in error, in relation to this matter, testified:

“The workmen generally mounted the platform by two trucks on the inside. * * *

“There generally were two trucks, one on the inside. We replace them both at the same time; they came in for loading; the loading crew generally done this replacing. * * * The height to which they were generally loaded depended on how fast the lumber came, and if we had cars to load them into quickly, and a great many things; they would go from two feet to

three feet high; that is, from 1,500 to 2,000 feet on a truck, 1,500 feet would be an ordinary load. The height would not make them fall off; it was the faulty loading that would make them fall off. The height would not cut any figure; you can load it as high as you please and not have it slide. * * * The boxing of the shaft which revolved the rollers on the outside had guards on." [Trans. of Record, pp. 185-187.]

As before observed, there was also evidence that the defendant in error could have stopped the trimmer or the entire mill before attempting to pass over the dog-roller. In fact, as we have seen, he testified that he, on previous occasions, had sometimes stopped the trimmer. [Trans. of Record, p. 155.] It is therefore apparent that the jury might easily have concluded that there were one or more perfectly safe ways maintained by the plaintiff in error by which the defendant in error could have gone to the push-table and that such fact was known to the defendant in error; that the defendant in error knew that lumber trucks were kept beside the loading and push-tables for the very purpose of allowing him, or any other employee, to reach the push-table; that when such means, for any reason, could not be used, that the employees could stop the trimmer or the mill.

In addition to this there was still another way in which the defendant in error could have gone, without injury, upon the table. Looking at the photograph on page 263 of the record it can be seen that at the end of the dog-roller there is an iron pipe which extends upward in the air. It must be borne in mind also that there was between the carrying-table and the loading-

table a platform, not shown in the picture, and it is perfectly apparent that the defendant in error could have stepped upon that platform, taken hold of the pipe and so stepped upon the table without stepping over or across the dog-roller. The same condition will be seen by examining the model, the wire at the edge of the table representing the pipe. [Trans. of Record, p. 171.] This was sufficient evidence alone to have necessitated the instruction. In regard to this the defendant in error testified:

“I identified on the photograph a piece of iron pipe that extended up from the corner of the push-table and to the end of the roller. That was there at the time of the accident. It was about three-quarter inch pipe, something like that.

“Q. Was it solid, put in securely? [165] A. There was a hole in there and it was down in that hole. I never took hold of that pipe when I got up.

“Q. Couldn't you easily have gone up on the push-table from the outside of the roller by putting your hands upon that pipe; could you not have stepped upon the projection there that covered this revolving shaft and gone up that way, without being in danger of getting your foot into the roller? A. Well, being it is easy,—I didn't form any conclusion; I most likely didn't observe it at the time; that pipe did not extend up very high. The pipe extended up about two feet; I was two feet below here, so the pipe stood up at least four feet from the level where I was standing.” [Trans. of Record, pp. 171-172.]

Since the plaintiff in error introduced evidence tending to show that there were two ways which it main-

tained by which its employees could go to the push-table when necessary without stepping over or coming near to the dog-roller, it was entitled to the instruction requested. No similar instruction was given by the learned court; nor was the jury anywhere informed that if the plaintiff in error, with the knowledge of the defendant in error, maintained a safe way by which he could go to the push-table, that defendant in error could not recover if he voluntarily chose a dangerous way.

Under the instruction as given, the jury were warranted in finding that the plaintiff in error was guilty of negligence even though they should believe that there was maintained by it one or more perfectly safe ways for its employees to go upon the push-table and that such ways were known to the employees and known to be safe, providing the jury also found that there was another way by which employees could go upon the table which was dangerous and was known to them to be dangerous.

We believe further argument is unnecessary to show that it was error for the court to refuse the eleventh instruction requested, and that such error was extremely prejudicial to plaintiff in error and alone necessitates reversal of the judgment.

Conclusion.

The case may be briefly summarized:

The defendant in error, a boy seventeen years of age, man grown, and doing a man's work, was employed in the sawmill of the plaintiff in error; upon entering that employment he undertook to study, and did study, the machinery in the mill. For two weeks he worked in front of the carrying-table and by the side of the push-table. During that time he observed the lumber coming in a continual stream upon the two tables. Every moment of the day he saw the rollers in the push-table in rapid revolution, propelling the lumber forward to the dog-roller; he saw the teeth of the latter fasten in the lumber and hurl it from the push-table to the carrying-table. He knew that the "X" board was within an inch or so of the dog-roller; he knew that the latter was armed with spikes, and, driven by the motive power of the mill, was making at least a hundred revolutions a minute. He knew that unless the mill or the trimmer was stopped the lumber would be sent in a continual stream upon both tables. He knew that when he was upon either his feet were liable to be struck by the swiftly moving lumber and knocked from under him. He knew that there was a way by which he could stop the mill. He knew that without stopping the mill he could stop the trimmer and thus arrest the lumber from coming upon either table. He had previously stopped the trimmer upon several occasions. He knew that trucks loaded with lumber stood beside the push-table and he had mounted to the push-table by these trucks and had seen others do so, but he thought that it was more "convenient" to step over the dog-roller.

On the day of the accident he observed a stick catch in the skids and feared a jam would result. He thought about stopping the trimmer, but decided that it was an unnecessary precaution. With the machinery running at full speed, and knowing that lumber would be pouring like a torrent over the dog-roller, he attempted to step or jump across it to the push-table.

There was not a single peril of his situation which was not open, obvious and apparent. The learned trial court, declined, however, to hold, as a matter of law, that he assumed the risk of his employment, or was guilty of contributory negligence and submitted the questions to the jury, instructing them that the employee did not assume any risk arising from the negligence of the employer; that in order to establish the defense of assumed risk, it must be shown that the employee had actual knowledge of the dangers of his work, thus allowing him to recover if he did not have actual knowledge of the danger of his work, although his failure to have such knowledge was the result of his own gross inattention and lack of care, and although there was no evidence that the defendant in error was not of ordinary intelligence and did not fully understand the operation of the machine. The learned court further charged the jury that in determining the issue of whether the plaintiff in error had used due care, they should consider whether the defendant in error fully understood the dangers of his situation, thus making the question of the care, or lack thereof, of the plaintiff in error depend upon whether the defendant in error appreciated the dangers to which he was exposed,

quite regardless of whether his employer had used due care in furnishing him a place of work. The learned court also instructed the jury that if they should believe that the defendant in error did not fully comprehend or understand the perils of his situation through his youth or inexperience, that it was the duty of his employer to have fully instructed him of such dangers and perils, and refused to charge that the employer was not required to instruct its employees of obvious, open and apparent dangers; also the learned court further refused the request of the plaintiff in error to instruct the jury to the effect that it could not be held negligent, except for such result as might reasonably have been foreseen or anticipated.

Although there was a great deal of evidence to show that there were two perfectly safe ways by which the defendant in error could have gone upon the push-table without crossing the dog-roller, the learned court refused the request of the plaintiff in error to charge that if the jury should believe that there were two such ways, one dangerous and the other safe, and so known to him, and he voluntarily chose the dangerous way, that he could not recover.

We submit that the record shows:

1. That the learned trial court erred in denying the motion for a directed verdict in favor of the plaintiff in error.

2. That the cause was submitted to the jury upon improper instructions and the jury were not properly or correctly charged as to the law governing the relation

of employer and employee as it existed at the time of this regrettable accident.

For each and all of the reasons which we have urged, we respectfully submit that the judgment must be reversed.

All of which is respectfully submitted.

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